Gen. No. 11728 Agenda 1

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
OCTOBER TERM, A. D. 1963

44 I.A.2d 16

CHARLENE BRODT, et al., Plaintiff-Appellant, vs. BEATRIX NOVAK, et al., Defendant-Appellee.	Appeal from Circuit Court of Du Page County.

CROW, P. J.

This is an appeal from an order of the Circuit Court of DuPage County by plaintiff Charlene Brodt, dismissing her as party plaintiff suing for personal injury for the reason that there was a prior litigation of the same occurrence conducted by her subrogee in which a verdict was rendered against the subrogee and in favor of the counterclaim of defendant Beatrix Novak.

The Trial Court, on September 27, 1962, granted the defendant's, Beatrix Novak, motion to dismiss the complaint of the plaintiff, Charles Brodt, and, in giving its decision, used the following language: "It is further ordered that the complaint of Charlene Brodt against Beatrix Novak be and the same is hereby dismissed."

Section 77 of the Civil Practice Act provides that appeals shall lie to the Appellate or Supreme Court, in cases in which any form of review may be allowed by law, to review

the final judgments, orders or decree of the Trial Courts. In the instant case, the motion to dismiss the plaintiff's complaint was sustained. To be final and appealable, this order should have been followed by a judgment. (VILLAGE OF NILES v. SZCZESNY (1958) 13 Ill. (2) 45; KRAMBEER, as Admin. etc., et al. vs. CANNING, et al. (1961) 33 Ill. App. (2) 208.) There was no judgment or final order entered herein.

For the reason there was no final and appealable judgment or order entered here, this appeal is dismissed without prejudice.

APPEAL DISMISSED.

SPIVEY, J. Concurs

WRIGHT, J. Concurs

CHICAGO BAR ASSOCIATION DEC 1963

ABST.

(44 I.A.2 35)

49104

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. EARL HONEYCUTT, Principal UNITED BONDING INSURANCE CO., a Corp., Surety, EDWARD KASTEL, Agent, Defendants-Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO Trial Court Numbers: 379559 Scire Facias 59 MC 8855 Criminal

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal by a surety on a forfeited bail bond from an order entered against it in the Municipal Court of Chicago for $1500, plus costs on November 30, 1962.

Defendant, United Bonding Insurance Co., as surety put up $1500 on June 22, 1959. On August 25, 1959, an order was entered forfeiting the bond upon the failure of the principal defendant, Earl Honeycutt, to appear in court, and directing the issuance of a scire facias writ commanding the principal and surety to show cause why the forfeiture should not be made absolute and the people have judgment on the bond. On September 4, 1959, a scire facias writ was issued requiring Earl Honeycutt, Principal, and United Bonding Insurance Co., a Corp., Surety, to appear before the court on October 13, 1959, and there show cause why the forfeiture should not be made absolute and the People have judgment on the bond. The bailiff's return of service of the writ showed service on the surety on September 8, 1959, and that "the other defendant cannot be found in the City of Chicago this 13th day of Oct. 59." The surety-defendant appeared specially to quash the scire facias writ and return of service and dismiss the proceedings on the ground that the return of the bailiff as to the principal-



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defendant was not made until the return day of the writ contrary to the provisions of Section 625 of the Criminal Code (Ill. Rev. Stat., 1959, Ch. 38, §625) which requires inter alia "which scire facias shall be served in like manner as process of summons in a civil action upon such person and his sureties at least 5 days before the return day on which the same is returnable." (Ill. Rev. Stat., 1959, Ch. 38, §625).

The People moved to strike the above motion on the ground that although service might not have been good on the principal it was good on the surety. The court made no ruling on either of the motions.

On September 30, 1960, a writ of scire facias identical with that of September 4, 1959, was issued. This writ was made returnable on November 2, 1960, and the bailiff's return of service showed service of the writ on the surety-defendant on October 3, 1960, and that "the other defendant cannot be found in the City of Chicago this 28th day of October, 1960." The surety appeared specially and moved that the writ of September 30, 1960, be quashed and the proceedings dismissed for the reason that the writ was not made returnable within 90 days from the date of forfeiture as required by Ch. 38, Sec. 625 (Ill. Rev. Stat., 1959, Ch. 3, §625).

The People moved to strike and dismiss the petition. The court entered an order overruling the motion to vacate scire facias proceedings and judgment was entered "by default" against the surety and principal. Although it was not made clear in the lower court it appears that judgment was entered on the second proceeding although there remained two motions to be disposed of in the first proceeding.

The appellant urges that the court was without jurisdiction to proceed to judgment on the scire facias writ of September 30, 1960. His position is that although a trial court has the power to issue an "alias writ," such writ must be made returnable on a date not more than 90 days after the bond forfeiture. Secondly, he urges that the writ of September 30, 1960 was unlawfully issued by the clerk without authority and was not made returnable "at least five days before" as required by the statute.

We believe that the case of People v. Tate, 26 Ill. App.2d 316 is determinative of this case. Although the Tate case did not make an express finding that an "alias writ" may be returnable after the 90 day period had elapsed, the court did send the case to the trial court for proceedings on an alias writ long after the 90 day period had elapsed.

The 90 day requirement of Section 625 of the Criminal Code as the Tate case made quite clear is a statute conferring jurisdiction over the subject matter. Once this jurisdiction has attached, defective jurisdiction over the person will not defeat it. See also, Lane v. People, 76 Ill. 300; People v. Wascher, 263 Ill. App. 614; People v. Lewis, 209 Ill. App. 3; People v. Thomas, 198 Ill. App. 409.

To hold that an "alias writ" must be issued within the original 90 day period would render the usefulness of the alias method almost nil. Rule 101.4 of the Supreme Court rules provides:

> "(1) On request of any party, the clerk shall issue successive alias summonses, regardless of the disposition of any summons or alias summons previously issued."
>
> "(5) The court may order the issuance of alias writs regardless of the disposition of writs previously issued." (Ill. Rev. Stat. Ch. 110, §101.4)

We believe that appellants' second objection also has no merit. Section 625 on its face provides that the clerk of the court shall issue a scire facias. Section 101.4 of the Civil Practice Act also on its face provides that the clerk shall issue alias summonses.

It further appears that the return on the September 30, 1960 writ was made on the fifth day. Section 625 provides that scire facias must be served "at least 5 days before the return day on which the same is returnable." Section 1.11 of the Construction of Statutes Act provides:

> "The time within which any Act provided by law is to be done shall be computed by excluding the first day and including the last, ..."
> (Ill. Rev. Stat. Ch. 131, §1.11)

Here, the writ was returnable on November 2 and the return of service showed that "the other defendant cannot be found this 28th day of October, 1960." The five day requirement was clearly met.

We feel that there is no substance to the errors urged by the appellant and believe that the judgment should be and is therefore affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and FRIEND, J., concur.

ABST.
CHICAGO BAR ASSOCIATION
DEC 1963

49135

CONNECTICUT FIRE INSURANCE COMPANY, a Corporation, NIAGARA FIRE INSURANCE COMPANY, a Corporation, and PATRIOTIC INSURANCE COMPANY OF AMERICA, a Corporation, Subrogees of TRINITY EVANGELICAL LUTHERAN CHURCH OF VILLA PARK, ILLINOIS,	)	44 I.A. 2 36
Appellees,	)	APPEAL FROM
v.	)	SUPERIOR COURT,
NORTH SHORE STEEL CRAFT, INC., a Corporation,	)	COOK COUNTY
Appellant.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

This suit was brought by three insurance companies, Connecticut Fire Insurance Company, Niagara Fire Insurance Company, and Patriotic Insurance Company of America, to reoover, by way of subrogation, the total sum of $3426.00, a third of which had been paid by each of them on account of a fire loss which took place during the construction of the Trinity Evangelical Lutheran Church in Villa Park, Illinois, allegedly due to the negligent use of a welding torch by defendant North Shore Steel Craft and its servants. The jury returned a verdict finding defendant guilty of negligence and assessed damages in the sum of $3426.00. Judgment was entered upon the verdict. Defendant's post-trial motions were denied.

In the fall of 1954, Trinity Evangelical Lutheran Church, plaintiffs' subrogor, commenced building a new church structure. The general contractor engaged defendant as a subcontractor to furnish, fabricate, and execute all structural steel work on the job. By January 11, 1955, the foundation was in, and certain prefinished laminated wooden arches were partially installed in place. The base of each arch was put in an iron shoe which was

attached to the floor. The arches, without further finishing or adornment, were intended to be a part of the interior décor of the church. They were furnished by the supplier to the job site wrapped with Sisal-Kraft, a protective covering having an asphaltic membrane on the inside and protective paper on the outside. Sisal-Kraft is a highly inflammable product.

About 8:00 a.m. on January 11, 1955, two of defendant's employees commenced a cutting operation requiring the use of an acetylene torch, on a metal shoe located at the base of one of the laminated wooden arches. Since the building was not yet under roof, this column and the arches above were still covered with the protective Sisal-Kraft. The evidence was conflicting as to the amount of Sisal-Kraft removed prior to the use of the torch and as to what precautions, if any, were taken to prevent fire. According to testimony offered by defendant, its employees, before starting work, tore off the Sisal-Kraft for a distance of about four feet and also brought a bucket of water to be used as fire protection. According to testimony offered by plaintiffs, about a foot and a half to two feet were removed, but there was no bucket of water present. It is conceded by defendant that there was no fire extinguisher near by.

According to plaintiffs' witnesses, defendant's employees were talking to each other and waving a lit torch around. One of the employees was told to "watch the torch" because the paper wrapping on the arches was very inflammable. Defendant's employees deny being warned. About ten minutes after defendant's employees had been working with the lit torch, the Sisal-Kraft on the arches was ignited. A flash fire ensued which resulted in the scarring of the arches. The extent of the scarring was in dispute, with

plaintiffs' witness, the architect on the job, testifying that the burning went into the arch about three-eighths of an inch on each side, and with defendant's witness, a structural engineer, testifying that the burning went in about one-eighth of an inch. However, both agreed that the structural value of the arches was not impaired.

Defendant raises two principal points in support of its plea for a new trial or for a substantial remittitur. First, it is urged that plaintiffs failed to prove that defendant was negligent; second, defendant argues that the church, in repairing the damages, should have restored the damaged arches by sanding and refinishing them, at a cost of $500.00 to $600.00, instead of by replacing them with new ones at a cost of $3426.00.

On the first issue, defendant urges two reasons why plaintiffs have not proved its negligence. It contends, first, that the verdict, although based on the theory of res ipsa loquitur, cannot be maintained on that theory. However, plaintiffs did not rely upon that doctrine, and the case was not submitted to the jury on that theory. The record discloses that the case went to the jury on allegations in the complaint of general negligence, leaving the jury entirely free to consider whether, under all the circumstances, defendant was or was not guilty of negligence. Also on the negligence issue, defendant alleges that the architect and the contractor were responsible for the dangerous condition which was the proximate cause of the damage, and contends that they should have been sued jointly with defendant. It is urged that they had created the dangerous condition by leaving highly inflammable paper on the arches. This paper was placed on the arches to protect them from the weather while the structure was

still not under roof. This did not constitute negligence. Moreover, plaintiffs were free, at their election, to sue the architect, the contractor, and defendant, either jointly or severally. Plaintiffs elected to sue only defendant. That the architect or contractor may also have been guilty of negligence does not relieve defendant from the legal consequences of its own negligence. This is settled law in Illinois. Paul Harris Furniture Co. v. Morse, 10 Ill.2d 28, 43, 139 N.E.2d 275 (1956).

Defendant's second ground urged for reversal or a substantial remittitur is that the church, in repairing the damaged property, should have recovered only the cost of restoring the damaged arches by sanding and refinishing, instead of the cost of replacing the damaged arches with new ones. The case went to the jury under proper instructions, both as to damages and other matters; in arriving at the amount of the verdict it followed the measure of damages approved in Kremeyer v. Shumate, 20 Ill.App.2d 542, 546, 156 N.E.2d 271 (1959). There plaintiffs appealed because of what they considered an inadequate award of damages for injuries to real property; in sustaining the judgment, the reviewing court said (p. 547) that "matters of controversy are for determination of the trial court. The trial court's findings will not be disturbed upon appeal unless they are manifestly against the weight of the evidence."

For the reasons indicated, the judgment of the Superior Court is affirmed, as is the order denying defendant's post-trial motions.

JUDGMENT AND ORDER AFFIRMED.

BURKE, P.J., and BRYANT, J., concur.

41 IA 2nd 156

63 0 11

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

44 I.A.2 156

October Term, A. D. 1963

CITY OF GREENVILLE, a Municipal Corporation,	)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of Bond County, Illinois
vs.	)	
DENNY WILLMAN,	)	
Defendant-Appellant.	)	

Honorable Foss D. Meyer, Judge Presiding

SCHEINEMAN, J.

The defendant was charged with reckless driving in violation of a city ordinance and was found guilty by the court sitting without a jury.

Defendant contends on this appeal that the testimony of the arresting officer was insufficient to prove him guilty of reckless driving; that the court erred in refusing to allow a witness to testify that defendant was not driving at an excessive rate of speed; that the court's conclusion was

in error in that it was based upon a presumption of guilt arising solely out of the fact that he was arrested; that the court erred in hearing evidence in aggravation without requiring the city to prove the disposition of previous traffic violations brought to the attention of the court; and, finally, that the city in failing to file a copy of the ordinance with the clerk thereby failed to prove a material allegation of its charge.

We have examined the testimony of the arresting officer and find that it would justify a finding, as a matter of fact, that the defendant was driving on a main city street for a distance of seven blocks in excess of the posted speed limit of 25 miles per hour. In fact, it is within the range of the testimony that the defendant was driving at approximately 50 miles per hour.

The defendant further contends that there was little or no traffic on the street at 6:30 A.M., although it was broad daylight. The fact remains that defendant was going at a speed which would prevent him coming to a stop in time to avoid a collision, if at any one of the six intersections there happened to be a car entering ahead of him from a side street, and driving at a reasonable and lawful rate of speed. Since the findings of fact are within the scope of the testimony before the trier of fact, the decision on the trial disposes of these contentions. The adequacy of the testimony of the arresting officer depends

upon his credibility which was also a question for the trier of fact.

Upon the point that the court refused to allow a witness to testify that there was no excessive speed, the court correctly ruled that the witness should not be permitted to give his opinion on the ultimate issue of fact. The witness was permitted to testify that he estimated the speed to be between 25 and 35 miles per hour.

As to alleged errors in receiving testimony in aggravation, they had no effect against the defendant since the court had previously found him guilty and stated, "I fix the fine the same as it was fixed before -- $ 50.00."

Finally, as to the failure to "file"a copy of the ordinance with the clerk, there is no requirement for such filing. The court takes judicial notice of ordinances within its jurisdiction. The contents of an ordinance should be disclosed to the court either by the published official book or other means. It is conceded that a copy was presented at the time of the opening statements and the defendant made no objection that there was any inaccuracy.

We have thus disposed of the alleged errors on the merits. There being no reversible error apparent, the judgment is affirmed.

JUDGMENT AFFIRMED.

Publish Abstract Only.

Culbertson, P.J. and Hoffman, J. concur.

FILED
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CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

44 [A 2nd 157

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

October Term, A. D. 1963

44 I.A.2157

Term No. 63-0-22 Agenda No. 16

FRANCES L. HUFSEY OSBORN, Plaintiff-Appellant,	)	
vs.	)	Appeal from the Circuit Court of Madison County, Illinois.
WELDON H. HUFSEY, Defendant-Appellee.	)	

CULBERTSON, P. J.

This cause is before us as the result of a hearing on a petition to modify a divorce decree seeking to change the custody of two children of the parties to the appellee who was the father, and taking such children from the custody of the appellant who was the mother. The original divorce decree had awarded custody of the two boys, nine and six years of age, to the mother. A little over a year following the divorce decree, on November 21, 1962, the petition to modify the decree asking for change of custody was filed, alleging that the appellant, the mother of the children was living in a state of adultery with a certain individual and that this man was convicted of the crime of taking indecent liberties with a minor child and was then on probation; and also, that the home in which appellant maintained the children was not a fit place to rear the minor children. Upon

a hearing of this cause it was shown that the appellant had married the man referred to and that he was her present husband. The Trial Court entered a modified decree awarding custody of the children of the parties to the father. On appeal in this Court it is the contention of the mother that such decree was erroneous since there was no finding that the appellant was an unfit person, and that there was insufficient evidence otherwise to justify a change of custody.

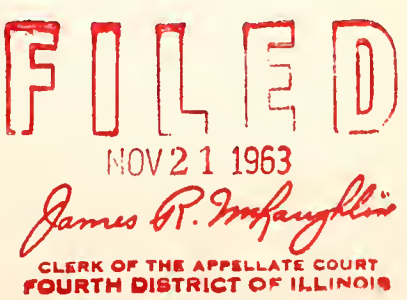
The Trial Court found that the home of the mother was not a fit, suitable, or proper home for the minor children and ordered a change of custody accordingly. This finding of the Court could have been justified by evidence as to the crowded conditions of the home and that the man to whom the mother was now married was a person of such character that children of tender years should not be associated with him (SEROTZKE vs. SEROTZKE, 335 Ill. App. 485). It was unnecessary that the Court make a finding that the mother was an unfit person to have custody of the children (PERATA vs. TOVAR, 13 Ill. App. 2d. 405).

We have frequently stated that the Trial Court has broad discretion in the matter of determining and changing custody of children in divorce cases, and that a Reviewing Court should not reverse such action unless the findings are clearly against the manifest weight of the evidence. It is apparent from the record that the findings and conclusions of the Trial Court in the case before us are clearly not against the manifest weight of the evidence and the modification of the decree of the Circuit Court of Madison County will, therefore, be affirmed.

Modified decree affirmed.

Scheineman, J., and Hoffman, J., concur.

Abstract Opinion.



44 IA 2nd

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In The

APPELLATE COURT OF ILLINOIS

Fourth District

(44 I.A.2 175)

DELMAR WILSON, as administrator of the Estate of Gary Wilson, Deceased,

Plaintiff-Appellant,

vs.

WILSON HAMPTON,

Defendant-Appellee.

Appeal from the Circuit Court of White County, Illinois

Honorable Randall S. Quindry, Trial Judge

SCHEINEMAN, J.

This is a wrongful death case in which the plaintiff appeals from a judgment for defendant entered on a jury verdict. The plaintiff contends the verdict is against the manifest weight of evidence and that the trial court was in error in certain rulings against plaintiff.

The undisputed facts are that plaintiff's intestate was riding as a passenger in a Rambler station wagon and was killed as a result of a collision with a Mercury automobile driven by the defendant. The occurrence was on June 18, 1962, about 7:30 P.M. and in daylight on a paved highway known as Route 1, north of Carmi, at a point where there is a cross road with a gravel surface, known as Bump's Crossing. The Rambler was going south on Route 1.

The principal issue is that plaintiff claims the Mercury came off the gravel road without stopping, and ran into the side of the Rambler; the defendant claims that he was going north on Route I and was hit head-on by the Rambler which had come across the center line into his northbound traffic lane.

The defendant was barred from testifying against the administrator, but there were two passengers in the front seat with him and another lying down in the rear seat. All three of these persons testified that the car they were in was going north from Carmi, and that they had not been on any gravel road. The passenger on the right side of the front seat was a woman, who also testified that she saw the southbound Rambler cross over the center line into the path of the northbound car, at which time she screamed, and remembered nothing further.

The only testimony for the plaintiff to support the plaintiff's contention that the car came from the gravel road was the testimony of drivers of two other vehicles who had seen dust rising from the graveled highway, when they were quite some distance from it, and neither of these witnesses had seen the collision occur.

A newspaper reporter in a nearby city heard ambulances depart, took his camera and followed, and came upon the scene of the collision before any wrecker. He tesified about the position of the cars and stated that the plaintiff's car was almost completely in the wrong lane with its right rear wheel near the center line and all the rest of the car in the northbound lane.

A State Highway Patrolman with the rank of Corporal received a call when he was a few miles from the scene. He went at once to the scene of the collision and made notes of what he found. He

stated that the Rambler was headed in a southeasterly direction in the northbound lane of traffic, while the Mercury was headed in a northeasterly direction.

An ambulance driver, with the help of some other trucks, pulled the cars for the purpose of unpinning the victims who were wedged in them, and in doing this the cars were moved. Before the Rambler was moved he stated that it was entirely in the southbound lane, except for the left four inches.

From the foregoing it is apparent the testimony of three witnesses was positive that defendant's car had not been on any gravel road, and to contradict this there is only the testimony that dust from the gravel road was seen some time prior to the witnesses seeing the cars. It is our conclusion that the verdict of the jury on this point is amply supported by the evidence, and there is no possibility of this court finding that it was against the manifest weight of the evidence.

The case of Collister v. Kroblin, 30 Ill. App. 2d 288 contains a review of the law respecting the status of a jury verdict when there has been conflicting evidence, and cites the following:

> "The law in this state is well settled that a reviewing court cannot substitute its judgment for that of a jury in passing upon the weight and credibility of conflicting testimony. DeLegge v. Karlsen, 17 Ill. App. 2d 69.
>
> "It is also a well established rule that where the evidence is conflicting, in order for a verdict to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. Stone v. Guthrie, 14 Ill. App. 2d 137.
>
> "Likewise, a verdict should not be set aside merely because a jury could have drawn different inferences from the evidence. Danhof v. Osborne, 10 Ill. App. 2d 529."

This court has stated a number of times that a court, on appeal, will not substitute its judgment for that of a jury, where

evidence is conflicting or reasonable men might draw different conclusions from it. Hilbert v. Dougherty, 34 Ill. App. 2d 174.

The plaintiff cites cases involving situations where the court of review found that a version of the accident was impossible or inherently improbable. In our opinion, these cases are not applicable to the evidence before the court.

It is assigned as error that the court excluded the testimony of a 17 year old boy. The boy lived on a farm about one and a half miles from the scene of the accident and stated that, while working on a machine in his front yard, between the hours of five and eight P.M., he had seen several cars pass on the gravel road and that one of them was a Mercury. He was unable to fix the time closer than some time between five and eight P.M. He had been shown the Mercury involved in the collision, and he was unable to identify it as a car that had passed him on the afternoon in question.

We are of the opinion that this offered testimony was too remote and involved nothing but conjectures, since the witness did not know whether the Mercury he saw had turned off somewhere, or gone onto the highway, nor what time it was, nor that it was the same car that was involved in the accident. We have held, "It is the province of the trial judge to pass upon the relevancy of collateral matters. If evidence offered is so remote that it does not appear to have an obvious tendency to elucidate the question in dispute, it should be rejected." Clark v. Rowatt, 349 Ill. App. 396. See also 20 Am. Jur. Evidence, Sections 248 and 249.

It is next contended that when the officer was testifying about dents and other conditions he observed on the Rambler, the

court refused to allow him to state what caused these dents. We are of the opinion the court's ruling was correct, since the witness, if permitted to answer, would be invading the province of the jury, instead of confining his testimony to what he saw, so that they could draw their own inferences. 20 Am. Jur., Evidence, Sections 765 and 766.

The plaintiff cites Bobalek v. Atlass, 315 Ill. App. 514. A witness testifying as to the other party's motions stated, "He turned so quick, to avoid hitting him we had to turn, swerve from hitting him." The court held that this was admissible as merely a short cut, to explain what actually took place, and that an eye witness may testify there was plenty of time to do a thing, or the time was too short, and such testimony is proper. We consider that this case is not in point as to observable facts in the markings on a vehicle, after a collision has occurred.

Finally, the plaintiff contends that the court was in error in refusing to allow him to use a blackboard to demonstrate the positions of the automobiles, during his final argument. The court had permitted plaintiff's witnesses to use the blackboard during their testimony to illustrate their version of the way the cars were found. The court ruled that plaintiff's attorney could sufficiently state to the jury his version of the position of the cars, without drawing any pictures. In our opinion under the facts of this case, in which pictures of the cars were introduced, and several versions given as to the position of the cars, the ruling as to the use of the blackboard was a matter in the discretion of the trial judge.

We conclude that the manifest weight of the evidence supports the jury's verdict, and the court's rulings were not in error. Therefore, the judgment is affirmed.

JUDGMENT AFFIRMED

Culbertson, P.J. and Hoffman, J. concur.

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NOV 19 1963
James R. McLaughlin
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

49131

44 I.A.2 191

MAX M. RAPPAPORT, LOUIS C. RAPPAPORT, and HAMILTON CLORFENE, a partnership, d/b/a RAPPAPORT, CLORFENE & RAPPAPORT, Appellants, v. MICHAEL N. PALLOTTO, Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an action to recover chattel mortgage foreclosure expenses, including attorneys' fees. In a non-jury trial, the matter was submitted to the court, as a matter of law, on a stipulation of facts. The trial court found for defendant, and plaintiffs appeal.

The question of law was "whether the plaintiffs' right of action was merged in or, as contended by defendant in his Special and Affirmative Defense herein, is barred by reason of the issues formed and judgment rendered in Municipal Court Case No. 60 M 3041, entitled, 'Arcweld Sales Company, a corporation vs. Michael N. Pallotto, d/b/a Steel City Testing and Engineering Laboratory and Joyce Bros. Co., a corporation' * * * in which cause judgment was rendered for the plaintiff, Arcweld Sales Company, a corporation, against Michael N. Palloto, etc., et al., in the sum of Two Thousand One Hundred Seventy-One ($2,171.00) Dollars and costs, subsequently paid and satisfied."

Defendant, Michael N. Pallotto, purchased equipment for the testing of metals from Arcweld Sales Company. After the

institution of chattel mortgage foreclosure proceedings, Pallotto agreed to return all of the equipment to Arcweld for full credit, subject to conditions set forth in a letter which was signed by the attorneys for both parties. The plaintiffs herein were the attorneys for the seller. Among other things, the letter stated that "when the equipment covered by the chattel mortgage * * * is picked up by our trucking company, and, upon inspection, the equipment and open account material has not been used, and the equipment is in good condition, I will deliver to you a release of the chattel mortgage, plus the return of the chattel mortgage note, and cancel the invoice account. You will pay $50.00 foreclosure expense and $150.00 moving expense, plus a reasonable attorneys' fee."

Arcweld employed Joyce Bros. to pick up the equipment from Pallotto, and later claimed that all the merchandise had not been returned. Pallotto insisted that Joyce Bros. had been given all of the equipment. Joyce Bros. contended that it had returned everything to Arcweld that it had received from Pallotto. Arcweld then filed suit for the value of the missing equipment, against both Pallotto and Joyce Bros., as co-defendants (Municipal Court Case No. 60 M 3041). A jury trial in that case resulted in a verdict and judgment for Arcweld against Pallotto and a not guilty verdict in favor of Joyce Bros., the co-defendant. That judgment for $2171.76 was paid and satisfied by Pallotto.

Plaintiffs, attorneys for Arcweld, then filed the instant

suit, in their own names, against Pallotto on his agreement of April 12, 1960, for the payment of $50.00 foreclosure expense, $150.00 moving expense, and a reasonable attorneys' fee. It was stipulated that these items totaled $1132. No questions are raised as to proper parties.

Defendant contends that plaintiffs are attempting to divide an entire demand or cause of action into separate demands, and that this is contrary to the law in this state; that plaintiffs were required to bring forward their whole case and, except under special circumstances, the law will not permit the same parties to open the same subject of litigation in respect to a matter which might have been brought forward as part of the subject contest. Cited in point is Camp v. Morgan, 21 Ill. 255 (1859), in which it is said:

> "The doctrine is well settled * * * that a plaintiff cannot so divide an entire demand, or cause of action, as to maintain several actions for its recovery. And if he sue and recover a judgment for a part only of such a claim, the remaining portion is barred by that recovery."

In Ritter v. Ritter, 381 Ill. 549 (1943), it was said:

> "Where an action based on the same wrongful act has been prosecuted by the plaintiff against the defendant to a successful issue, he can not in a subsequent action recover, as damages, his costs and expenses in the former action. * * * The policy of the rule is obvious. If the wrongful conduct of a defendant causing the plaintiff to sue him would give rise to an independent tort and a separate cause of action, there would be no end to the litigation, for immediately upon the entry of judgment the plaintiff would start another action against the defendant for his attorney fees and expenses incurred in obtaining the preceding judgment. * * * The cases all confirm the rule that attorneys fees and expenses of

> litigation can not be recovered in a subsequent suit as damages by a successful plaintiff who has been forced into litigation by reason of defendant's wrongful conduct."

Plaintiffs contend, as stated in Harding Co. v. Harding, 352 Ill. 417, 427 (1933):

> "When the second action between the same parties is upon a different cause of action, claim or demand, it is well settled that the judgment in the first suit operates as an estoppel only as to the point or question actually litigated and determined and not as to other matters which might have been litigated and determined. In such cases the inquiry must always be as to the point or question actually litigated and determined in the original action."

Also cited is City of Elmhurst v. Kegerreis, 392 Ill. 195 (1945), in which it is said:

> " * * * the inquiry must always be as to the points or questions actually litigated and determined in the former action, and not what questions might have been litigated and determined in such suit. It is only upon such questions that the former judgment is conclusive in the subsequent action."

Initially, we note that neither the former action nor the instant action are bottomed on the chattel mortgage. The first action was against Pallotto, the purchaser of the equipment, and Joyce Bros., a trucking company, for the value of the equipment, which was either not delivered to Joyce Bros. by Pallotto or, if so delivered, was not returned to Arcweld by Joyce Bros. The jury returned a verdict against Pallotto and exonerated Joyce Bros. Plaintiffs then sued on the agreement of April 12, wherein defendant, through his attorney, agreed to pay the subject items of the instant suit, after undertaking to return all of the purchased equipment.

We believe the principal "point or question" in the former suit was to determine which one of the two parties was responsible for the value of the missing equipment. As to the instant items, Joyce Bros. was not a party to the agreement of April 12 and did not agree to pay any of the items there included. If Pallotto had been the only defendant in the former action, we agree that the items should have been made part of that action. We also agree that the items might have been included in the previous action even though that issue would not have applied to Joyce Bros.

However, as said in Harding Co. v. Harding, our present inquiry must be "as to the point or question actually litigated and determined in the original action" and "not as to other matters which might have been litigated and determined." Applying the foregoing test to the stipulated facts, we conclude that the point in controversy in the prior suit was the identity of the party responsible for the value of the missing equipment, and until that issue had been determined, plaintiffs, with propriety, could withhold their action for the recovery of the items agreed upon in the letter of April 12, 1960. Therefore, the judgment in the former suit is no bar to the instant action.

For the reasons stated, the judgment appealed from is reversed and the matter is remanded with directions to enter judgment for plaintiffs for the stipulated amount and costs.

REVERSED AND REMANDED WITH DIRECTIONS.

ENGLISH, P.J., and BURMAN, J., concur.

Nov. 18/63

Abstract only.

ABST.

49066

44 I.A.2 234

THE CATHOLIC BISHOP OF CHICAGO, a corporation sole,

Plaintiff-Appellee,

v.

ROBERT EMMETT LEE,

Defendant-Appellant.

APPEAL FROM THE MUNICIPAL COURT OF OAK PARK, ILLINOIS.

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal in a forcible entry and detainer action from a judgment on a directed verdict in favor of plaintiff at the close of defendant's evidence. Defendant with his wife and family moved into a first floor apartment in a building owned by plaintiff at 418 South Humphrey Avenue, Oak Park, Illinois, on June 15, 1957. There was no written agreement, and the monthly rental payments were $75.00. On June 28, 1962 plaintiff served a thirty day notice of termination of tenancy on defendant's wife.

Defendant contends that plaintiff was not entitled to a directed verdict as there was evidence that his tenancy was a holdover one from year to year and that therefore he was entitled to continued possession unless 60 days' notice was given within the last four months of the tenancy. Ill. Rev. Stat., ch. 80, § 5 (1961). Plaintiff, on the other hand, maintains that the tenancy was from month to month and terminable by giving 30 days' notice.

Defendant bases his contention that the original lease was a tenancy from year to year on a conversation he had in September 1957 with the pastor and agent of the plaintiff. Defendant testified: "I told him 'Don't forget

we were promised a year at least, otherwise we wouldn't be putting in all of this work, expense and time that we have expended' and [the pastor] answered 'That's right, you have your apartment for a year, until June of next year.'" The trial court notwithstanding this testimony directed the jury to find for the plaintiff and entered a judgment upon the verdict.

The motion to direct should not have been allowed. A motion made by a plaintiff for a directed verdict should be denied if the evidence on behalf of the defendant, with all reasonable inferences to be drawn therefrom favorable to him, supports his case. Hering v. Hilton, 12 Ill. 2d 559, 563, 147 N.E.2d 311, 314; Busser v. Noble, 22 Ill. App. 2d 433, 441, 161 N.E.2d 150, 154.

The rule is different after verdict. Then the trial court in passing on a motion for a new trial determines whether the preponderance of the evidence is against the verdict. Stevenson v. Byrne, 3 Ill. App. 2d 43, 120 N.E.2d 377; Eilers v. Chicago Transit Authority, 2 Ill. App. 2d 233, 119 N.E.2d 449; Hills v. Chicago Transit Authority, 2 Ill. App. 2d 44, 118 N.E.2d 65 (Abst.); Read v. Friel, 327 Ill. App. 532, 64 N.E.2d 556.

In the instant case the inference favorable to defendant which may be drawn from the conversation hereinbefore set forth is that he had a tenancy from year to year, rather than from month to month, and this, under the statute hereinbefore cited, would have required a sixty day notice. We do not find that this is conclusive, but it is sufficient

to require that the issue be submitted to the jury, and that is what the trial court should have done.

The judgment is reversed and the cause is remanded with directions to grant a new trial and for such other and further proceedings as are not inconsistent with the views herein expressed.

Judgment reversed and cause remanded with directions.

McCormick and Dempsey, JJ., concur.

ABST.

48900

LOUISE LUEBKE, by ROBERT B. LUEBKE, Conservator of the Estate of Louise Luebke, Incompetent and ROBERT B. LUEBKE, individually,

Plaintiffs-Appellees,

v.

LAURA M. BROWNING,

Defendant-Appellant,

and

FIRST NATIONAL BANK OF LAKE FOREST, as Trustee under Trust Nos. 492 and 471, and as Administrator of the Estate of Harry J. Luebke, Deceased,

Defendant.

APPEAL FROM THE SUPERIOR COURT OF COOK COUNTY.

(44 I.A.2 272)

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The facts and the long history of this case are detailed in Luebke v. Browning, 18 Ill. App. 2d 427, 152 N.E.2d 589 (1958), and will not be repeated here. The suit is to impress a trust on the proceeds of a sale of real estate. It was brought by Robert Luebke in his own behalf and as conservator of the estate of an incompetent sister, Louise, against another sister, Laura Browning, and the First National Bank of Lake Forest, the administrator of the estate of their father and the trustee under two trusts.

The first appeal was from an order entered by the chancellor upon the recommendation of a master in chancery. The master recommended the dismissal of the plaintiffs' amended complaint because they had failed to sustain their burden of proof in reference to an alleged gift made by

their father, as trustee, and because they were guilty of laches. This court held that the master and chancellor were in error (a) because the circumstances of a certain transaction created the presumption of a gift, (b) that the burden of rebutting it was upon the defendants and (c) that while Robert Luebke was guilty of laches in his own behalf, he was not guilty of laches as conservator of the estate of Louise, because an incompetent cannot have her rights defeated by the defense of laches. This court, therefore, affirmed the order as to Robert Luebke, reversed it as to the estate of Louise, and remanded it with directions to grant the conservator the relief prayed for in the amended complaint and for such further proceedings as would be consistent with the prayer.

After remandment, the conservator filed a petition asking what he believed the incompetent's estate was entitled to under our mandate. The defendant, Laura Browning, agreed to some of the items and objected to others. The chancellor re-referred the cause to the master with directions to state the account between the parties pursuant to the mandate of this court. The master's findings of fact and new recommendations were, in the main, based upon the record previously made. These findings and recommendations were approved by the chancellor who entered a decree in accordance with the master's report.

The present appeal is by the defendant, Laura Browning, who contends that the master's findings and the court's decree are not in accord with the mandate of this

court and that a correct accounting was not made.

We disagree with the defendant. The mandate of this court was followed and the accounting was rendered upon a proper basis. A thorough and careful examination of the record reveals no error which would necessitate a second reversal. The decree of the Superior Court is affirmed.

Affirmed.

Schwartz, P.J., and McCormick, J., concur.

ABST.

49076

44 I.A.2 273

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

ROBERT C. PRANO,

Defendant-Appellant.

APPEAL FROM THE VILLAGE COURT OF MAYWOOD.

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment entered on a jury verdict finding him guilty of driving an automobile without a license in the Village of Maywood.

On the evening of February 28, 1962, two police officers of the Village of Maywood were observing traffic on Washington Boulevard at 19th Avenue, which is within the village. They saw the defendant driving east on Washington Boulevard and believing him to be speeding, they followed and "clocked" him. According to the testimony of one officer, the clocking started within the Village of Maywood and proceeded beyond it. It showed that defendant was going at the rate of 60 miles per hour when arrested. They stopped him after he had passed out of the village, arrested him for speeding and asked for his driver's license. Instead of a driver's license, defendant presented the officers with a receipt from a currency exchange, showing that an application for a license had been made. Investigation revealed that defendant's license had been issued but had been revoked before the time of the arrest.

Two charges were made against defendant. First, speeding within the village; and, second, driving without

a license within the village. The speeding charge was dismissed, and the state relied on the charge of driving without a license. To sustain that charge the state introduced a certified copy of records maintained by the Secretary of State, showing that the driver's license of one Robert C. Prano had been revoked. This was a proper method of proving that charge. People v. White, 24 Ill. App. 2d 324, 164 N.E.2d 823.

It is contended by defendant that there is not a sufficient identification of the defendant with the Robert C. Prano named in the records maintained by the Secretary of State. The address shown on the order of revocation was 158 North 20th, Melrose Park, Illinois. The capias for defendant's arrest was issued for him at that address and was served on him. His date of birth in the order of revocation was shown as December 18, 1918, but the arrest slip give his birth date as December 18, 1919. That is the only point of difference. It was also shown on the order of cancellation of his license that his license number was P 650-7361-3859, which is identical with the license number placed on the arrest slip, taken from the currency exchange receipt for application for a driver's license. The evidence clearly established that defendant was the licensee whose driver's license had been revoked. There is no merit in defendant's argument to the contrary.

Defendant contends that the village court was without jurisdiction. The fact is that he was first observed by the police officers at 19th avenue within the Village of Maywood; that the officers followed him and

arrested him outside the village for an offense committed within the village. Therefore the court had jurisdiction. Ill. Rev. Stat., ch. 37, § 333 (1961).

While the point is not made in his Points and Authorities, defendant argues in the body of his brief that the arrest was illegal and therefore the currency exchange receipt indicating application for a license and the certificate showing the license revocation could not be offered in evidence. He relies on the provisions of Article II, § 6, of the Constitution of Illinois, guaranteeing the right of people to be secure in their persons against unreasonable searches and seizure. As this raises a constitutional question, we cannot consider it in this court. People v. Cosper, 5 Ill. 2d 97, 125 N.E.2d 60; People v. Richardson, 397 Ill. 84, 72 N.E.2d 851; Village of Maywood v. Weglarz, 24 Ill. App. 2d 495, 165 N.E.2d 362.

The guilt of the defendant was clearly established.

Judgment affirmed.

McCormick and Dempsey, JJ., concur.

(32825—9-66) 14

STATE OF ILLINOIS

APPELLATE COURT

44 I.A.2 280

AT AN APPELLATE COURT, for the ~~Fourth~~ THIRD Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE WILLIAM M. CARROLL, Presiding Judge

HONORABLE C. ROSS REYNOLDS, Judge

HONORABLE BURTON A. ROETH, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 6th day of DECEMBER A. D. 1963, there was filed in the office of the said Clerk of said Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

General No. 10482 Agenda No. 12

Roy Harwood,
Plaintiff-Appellant,
vs.
Amen J. Attella,
Defendant-Appellee.

Appeal from the Circuit Court of Coles County.

REYNOLDS, J.

This is a suit on a check drawn by defendant. The check was dated August 29, 1958, payable to Z. N. Sloan, in the amount of $2250.00. Sloan endorsed it to plaintiff. The check was dishonored for insufficient funds. The check was not put through for collection again, but in April 1961, suit was instituted by plaintiff in the Circuit Court of Coles County. The cause was tried by the court and the court found for the defendant. The plaintiff appeals.

Plaintiff's theory on appeal is that the court erred in permitting the defendant to introduce evidence of an affirmative defense, since the defendant had pleaded only a general denial; that the check was a negotiable instrument, the plaintiff was a holder in due course and that failure of consideration was unavailable to defendant in such case.

The defendant's theory on appeal is that the plaintiff's case, as presented, did not conform to his case as alleged in the complaint, and that the parol evidence of failure of consideration was properly admitted.

There is very little dispute as to what happened. Attella, a buyer and seller of oil leases, agreed to buy certain oil drilling equipment from the plaintiff Harwood, for $4,500.00. He was to pay $2250.00 down and the balance within 30 days. He wrote the check for the down payment to Mrs. Sloan, his agent, who in turn endorsed it to the plaintiff with the following endorsement on the back:-

> "Pay to the order of Roy Harwood as a 1/2 down payment on complete oil equipment as per Bill of Sale heretofore furnished."

Defendant admits drawing the check, admits it has not been paid, but raises the question of failure of consideration for the check, claiming the check was only a token of good faith, predicated upon his producing oil on land under lease to the plaintiff and others, the lease having been assigned to Mrs. Sloan, agent of the defendant.

The plaintiff admits the lease and signatures thereon and while not denying any provision of the lease claimed there was no contingency as to the lease or the sale of the equipment. The lease in question contained an assignment where Z.N. Sloan agreed to commence the drilling of a test well on or before September 27, 1958, and to drill to a sufficient depth to test the McCloskey formation. In the event that there was a producing well, the said Z. N. Sloan agreed she would purchase one complete set of used equipment from the assignor, Roy Harwood, for the sum of $4,500.00. The assignment also provided that it would be null and void, unless a well was commenced as provided therein and all interest therein would revert to the assignors. The assignment was dated July 2, 1958, and the deadline for

drilling was apparently amended to September 27, 1958, the amendment being initialed by the Plaintiff Harwood.

It is true that Chapter 110, Section 43, Subsection 4 (I.R.S.) provides that an affirmative defense must be pleaded, where such defense, if not expressly set forth in the pleading, would be likely to take the opposite party by surprise. The defense of failure of consideration is expressly set forth in this section of the Statute. Where such an affirmative defense is pleaded, the burden of proof for such affirmative defense is not on the plaintiff as a matter of negative proof, but on the defendant as affirmative proof. Bauer v. Sawyer, 6 Ill. App. 2nd 178, 193. Had the plaintiff stopped with the introduction of the check, and the proof that it had not been paid, the evidence of the defendant as to want of consideration or failure of consideration would have been clearly inadmissible. Instead, the plaintiff himself opened wide the door for the admission of proof for the defendant as to the lease and the lack of consideration. The evidence as to the purchase of the oil well equipment and the circumstances of the purchase were brought out in the direct examination of the plaintiff. Having

opened the door, the plaintiff cannot now complain when the defendant opens the door wider and introduces all the evidence concerning the purchase of the equipment, the lease involved and whether the check was actually intended to be cashed or paid until an oil producing well was drilled.

Here, the sole issue according to the pleading was the check and its non-payment. The plaintiff, by his testimony, injects the issues of failure of consideration, want of consideration and issuance as a contingency. It is well settled in Illinois, that when litigants try a cause upon a certain theory, that regardless of the pleadings, the trial will stand. Here, the plaintiff tried the cause upon his theory that the defendant had issued his check for payment of one half of certain oil well equipment, that the check was unpaid, that he had sold the equipment at a loss and the defendant was liable. Having elected to try his case on that theory, he is bound by the result.

The evidence showed that a certain lease to drill for oil had been assigned to the defendant. The time for drilling had run out,

but apparently the plaintiff had changed the expiration date and initialed the change on the lease. On the lease it stated that Z. N. Sloan, agent of the defendant, agreed to commence the drilling of a test well upon th assigned acreage on or before September 27, 1958, and to drill the same to a sufficient depth to test the McCloskey formation, and, in the event the test well was completed as a producing well she would purchase one complete set of used equipment from the plaintiff Harwood for the sum of $4,500.00. The well was drilled and it was testified that it was not a producing well. The defendant testified the check was only a token of good faith, and that he would have had no use for the equipment unless he had a producing well.

The contention of the plaintiff as to the contingency is that he was a holder in due course and that proof of an oral contemporaneous agreement is inadmissible. To make the plaintiff a holder in due course, he must rest his case upon the technicality that the check was made out to Z. N. Sloan, who in turn endorsed it to him. Z. N. Sloan was admittedly an agent for the defendant and acting for him. The plaintiff knew this when he took the check.

As an agent, the act of Sloan was the act of the defendant, with no intervening party, so that the transaction was a check from the defendant to the plaintiff. To be a holder in due course certain conditions must be met. The instrument must be complete and regular on its face; it must be taken in good faith and for value; and at the time it is negotiated the taker must have no notice of any infirmity in the instrument. Illinois Revised Statutes, Chapter 98, Section 72. On the basis of the testimony here the plaintiff does not meet these conditions.

Finally, the plaintiff relies on the rule that parol evidence cannot be admitted to contradict or change a written contract. While this is a recognized rule of general application, yet evidence that the instrument was not intended to take effect as a valid obligation until the occurrence of some future contingency is usually held admissible between the original parties and between them and those taking with notice. Such evidence, it is held, does not contradict the terms of the writing or vary its legal import but tends to show that it was never delivered as a present contract. Bell v. McDonald, 308 Ill. 329, 336;

Mandell v. Miller, 14 Ill. App. 2nd 430, 440; Spindler v. Krieger, 16 Ill. App. 2nd 131, 139.

Examination of Defendant's Exhibit No. 1, the lease from Cunningham to the plaintiff and others, which was assigned to Sloan, the contingency as to the sale of the oil well equipment is clearly and plainly set forth. Because there was this contingency, the check was based on the contingency and there was not a complete contract. There being no complete and present contract, the plaintiff cannot recover on the check.

The judgment will be affirmed.

Affirmed.

CARROLL, P.J. and ROETH, J. concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

44 I.A.2d 355

At a term of the Appellate Court, begun and held at Ottawa, on Tuesday, the 1st day of October, in the year of our Lord one thousand nine hundred and sixty-three, within and for the Second District of Illinois:

SECOND DIVISION

Present -- Honorable DeWITT S. CROW, Presiding Justice
Honorable JOHN F. SPIVEY, Justice
Honorable CLARENCE E. WRIGHT, Justice
PAUL V. WUNDER, Clerk
JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On the same being one of the days of the term of Court aforesaid, the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

General No. 11795 (Abstract only.)

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT
(SECOND DIVISION)

OCTOBER TERM, A. D. 1963

BRITA STEINER, Plaintiff-Appellee, vs. FRANK J. STEINER, Defendant-Appellant.	Appeal from the Circuit Court of Winnebago County, Illinois

SPIVEY--J.

This is an appeal by the defendant counter-plaintiff Frank Steiner from a decree of the Circuit Court of Winnebago County granting the plaintiff counter-defendant a divorce on the ground of extreme and repeated cruelty and dismissing for want of equity the counterclaim charging adultery.

Plaintiff filed her complaint for divorce charging extreme and repeated cruelty and for injunction on December 5, 1961. On January 3, 1962, defendant filed his answer denying the alleged acts of cruelty and counterclaimed alleging adultery on the part of plaintiff. Plaintiff replied to the counterclaim on January 8, 1962, denying the alleged acts of adultery. On May 17, 1962, plaintiff was granted leave to amend her complaint by adding an additional paragraph charging the defendant with acts of adultery between January, 1962, and March, 1962. The trial court on May 28, 1962,

on motion ordered the plaintiff to file a bill of particulars within three days covering the alleged acts of adultery charged to the defendant.

During the interval from the filing of the complaint to September 28, 1962, numerous hearings were had on charges and counter charges for contempt, custody and temporary child support. Orders were entered in these matters by all three of the judges of the Circuit.

Judge Dusher was advised on September 24, 1962, that the defendant was confined in a hospital suffering from two gastric ulcers and the hearing was continued to September 28, 1962. Thereafter counsel for the plaintiff upon being advised that defendant would be incapacitated for at least thirty days agreed that the cause might be continued indefinitely until the defendant was physically able to appear in court and agreed that he would appear in court on the morning of October 3, 1962, and request that the cause be so continued. On September 27, 1962, in the late evening counsel for defendant learned that subpoenas had been issued for a hearing at 1:30 P. M. on the following day.

Defendant's motion for continuance was filed and presented on September 28, 1962. Affidavits in support of this motion were filed by the defendant, his counsel and his treating physician which affirmed the matters hereinabove set forth.

On September 28, 1962, proceedings were had before the Honorable William R. Dusher. At this time it was suggested that the plaintiff had failed to file the bill of particulars ordered on May 28, 1962. After a lengthy discussion and consultation plaintiff withdrew her amendment to the complaint charging the defendant with alleged acts of adultery. On the same day the Court denied defendant's motion for a continuance and set the case for hearing on October 2, 1962, at 1:30 P. M. Upon learning that a child was involved, at the Court's instance, a discussion off the record was held in chambers.

It is not clear from the record whether the motion for continuance was denied before or after the off-record conference held in chambers.

On October 2, 1962, a motion for a change of venue from Judge Dusher was filed by defendant. It alleged in the main that defendant would not receive a fair and impartial trial before Judge Dusher because he verily believes the Judge is prejudiced against him on account of the charge which he has made in his counterclaim against the plaintiff; namely, the charge of adultery. Defendant further alleges that said prejudice first came to his knowledge on September 28, 1962.

In defendant Frank Steiner's affidavit in support of his motion for a change of venue he stated in part, "That said cause came on for hearing before the Hon. William R. Dusher on Friday, September 28, 1962. That the counterclaim in said cause against the plaintiff charges the plaintiff with adultery. In a conference between counsel and parties on both sides in the chambers of the Hon. William R. Dusher, the Judge announced that he was opposed to having evidence introduced on a charge of adultery against a woman who had a child or children. The plaintiff in this case is the mother of a boy seven years of age. The Hon. William R. Dusher then stated that in the event the defendant persisted in bringing his charge of adultery and introducing testimony in regard to the same, the case would be taken under advisement and no divorce would be granted unless the Judge were ordered by a writ of mandamus to rule on the case."

The motion for change of venue was presented to Judge Dusher on October 2, 1962, at 1:30 P.M. No counter affidavits were presented nor evidence heard. Upon reading the motion Judge Dusher summarily denied the motion. He again repeated his feelings for those who seek a divorce on the ground of adultery where children are involved. Following the denial of the motion a hearing was first commenced on the issues joined by the complaint, answer, counterclaim and reply.

Defendant for reversal charges the Court erred in not granting his motion for change of venue; erred in excluding defendant's evidence of occurrences tending to prove plaintiff's adultery; and the decree was contrary to the manifest weight of the evidence.

No question is raised as to the sufficiency of the petition required by the Act relating to change of venue, Ill. Rev. Stat. 1961, Chap. 146, Sect. 1 et seq. Plaintiff's only contention is that the petition was not filed in apt time. In this respect plaintiff points out that Judge Dusher had previously heard certain matters relating to an injunction, a contempt citation, and custody. All of these hearings were prior to the hearing on the merits of the divorce.

It has been often said that the provisions of the change of venue act should be construed liberally rather than strictly so as to promote rather than defeat the right to a change of venue particularly where prejudice on the part of the judge is charged. (People v. Chambers, 9 Ill. 2d. 83, 136 N.E. 2d. 812, and cases cited therein; People v. Smith, 192 N.E. 2d. 880.)

"Where the application for change of venue is made on account of prejudice of the trial judge, the statute gives no discretion, but such judge, if the petition is in proper form and duly verified, must grant the petition and allow the change of venue." Simpson v. Simpson, 165 Ill. App. 515. Quoted with approval in Gates v. Gates, 38 Ill. App. 2d. 446, 187 N.E. 2d. 460.

The Supreme Court in discussing the question whether a petition for change of venue had been filed in apt time said in People v. Chambers, 9 Ill. 2d. 83, 136 N.E. 2d. 812, "It is uncontroverted that the law requires a petition for change of venue to be offered at the earliest practical moment, and that a petition filed after the hearing has commenced will be denied on the ground that it is filed too late." Further it is said, "The requirement that a petition for change of venue be filed at the earliest practical moment is designed to preclude counsel from first ascertaining the

attitude of the trial judge on a hearing relating to some of the issues of the cause, and then, if the court's judgment is not in harmony with counsel's theory, to assert the prejudice of the court as a ground for allowing a change of venue." In concluding the court said, "From the foregoing cases the criterion of the timeliness of a motion for change of venue is not the impanelling of a jury or the commencement of a trial on the merits, but rather whether the court has considered a substantive issue in the cause."

We gleen from the cases reviewed by the Court in the Chambers case that a hearing on the issues refers to a formal hearing that will be binding on the parties and affect the court's decision on the merits.

In the instant case the prejudice of the trial judge was learned at an informal conference and not upon any hearing on the merits.

A hearing on a motion for continuance has been held not to be a consideration of a substantive issue in a cause of action. (People v. Cohen, 268 Ill. 416, 109 N.E. 259.) Hearings on questions of temporary alimony have likewise been held not to be a consideration of substantive issues. (Gates v. Gates, 38 Ill. App. 2d. 446, 187 N.E. 2d. 460.), and in temporary child support hearings. (Jones v. Jones, 40 Ill. App. 2d. 217, 189 N.E. 2d. 33.)

We have reviewed the cases cited by plaintiff to support her theory that the motion for change of venue was not filed in apt time and find that they are not controlling. In Commissioners of Drainage District v. Goembal, 383 Ill. 323, 50 N.E. 2d. 444, the court had already ruled on a separate preliminary legal issue which was an integral part of the entire proceeding. In Russell v. Russell, 333 Ill. App. 68, 77 N.E. 2d. 328, the cause had been pending on the trial judge's calendar for four months. On June 11, 1946, counsel for both sides agreed to a hearing on June 26, 1946. The change of venue motion was not filed until June 25, 1946.

In Paramount Paper Tube Corp. v. Capital Eng. & Mfg. Co., 11 Ill. App. 2d. 456, 138 N.E. 2d. 81, the motion for change of venue was filed after the hearing on a petition to vacate a default judgment was heard and taken under advisement.

In the instant case we find that defendant's motion for change of venue was filed in apt time in that no substantive issue in the cause had been before Judge Dusher.

Substantial justice for both parties requires a new trial. For that reason we refrain from a recitation of the evidence except to say the report of proceedings confirms the trial court's prejudice.

The cause of action is reversed and remanded with directions to the trial court to grant defendant's motion for change of venue and for a new trial.

Reversed and remanded with directions.

Crow, P. J., and Wright, J., concur.

No. 11793 Publish Abstract Only Agenda 8

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT., SECOND DIVISION

OCTOBER TERM, A. D. 1963

44 I.A.2367

YEAR INVESTMENTS, INC., an Illinois Corporation, Plaintiff-Appellee, vs. THOMAS E. JOYCE, LEO PALEWICH, JR., AND WORLD WIDE BROKERAGE CORPORATION, a Delaware Corporation, Defendants-Appellants.	Appeal from the Circuit Court of Du Page County.

WRIGHT -- J.

This is an appeal from the Circuit Court of DuPage County, Illinois. The trial court, sitting in chancery, without a jury, heard the evidence and entered a decree finding defendants, Thomas E. Joyce, Leo Palewich, Jr. and World Wide Brokerage Corporation, guilty of a conspiracy to defraud the plaintiff, Year Investments, Inc., and dismissed the remainder of the defendants. The court denied plaintiff's prayer for punitive damages and assessed the damages of plaintiff at $12,816.95, plus interest of $1,011.31, plus reasonable attorney's fees of

$2,000.00 and reasonable expenses of $1,337.53, making a total judgment for plaintiff and against the defendants in the amount of $17,165.79. Defendants, Thomas E. Joyce, Leo Palewich, Jr. and World Wide Brokerage Corporation, bring this appeal.

Since there is no issue before this court on the pleadings, it would unduly lengthen this opinion to recite the various charges and counter-charges made in the complaint and the answers to said complaint. Suffice to say, the complaint charges these defendants with a conspiracy to defraud the plaintiff of three parcels of real estate in that they dated, sealed, acknowledged and recorded an incomplete deed to certain parcels of real estate in DuPage County, Illinois, and seek equitable relief.

The Supreme Court of Illinois, in Tribune Company v. Thompson, 342 Ill. 503, 174 N. E. 561, clearly establishes the proof necessary to make a case of conspiracy in the State of Illinois. On pages 571 and 572 of 174 N. E., and on pages 529 and 530 of 342 Ill., the court said:

> "It first must be noted that the burden of proof is upon the complainant to prove the appellants guilty of conspiracy, as charged in the bill of complaint, by clear and convincing evidence. The decree in this case must stand or fall upon the charges made by and the evidence produced under the second amended complaint..., and if the facts and circumstances relied upon are as consistent with innocence as with guilt it is the duty of the court to find

> that the conspiracy has not been proved and to enter a decree dismissing the bill for want of equity... In order to establish a conspiracy, evidence must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise."

Consequently, to prove a conspiracy to defraud, there must be clear and convincing evidence from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of an unlawful enterprise.

In this case the trial judge sat both as a judge and jury. He was both the trier of the law and the facts. It was for him to determine the facts from the evidence produced at the trial. He and he alone heard the evidence, saw the witnesses and was in a position to determine the credibility of the witnesses and the evidence produced. The decree from which this appeal is taken sets out in detail the findings of the trial court which are as follows:

> "1. On or about January 2, 1960, plaintiff and Thomas E. Joyce entered into a contract for the sale to Joyce of certain land and subdivided lots in Kane County, Illinois, known as Blackberry Heights.
>
> 2. Pursuant to said contract, the defendant Thomas E. Joyce, caused the defendant World Wide Brokerage Corporation to convey to plaintiff title to Lot 23 in Block 1 in H. O. Stone & Co's Irving Park Boulevard Addition to Wood Dale, Du Page County, Illinois, known as the "Essig" property; Lot 9 in Block 13 in said H. O. Stone & Co.'s Irving Park Boulevard Addition, known as the

"Jarnebro" property; and lot 19 in Block 9 in H. O. Stone & Co's Second Irving Park Boulevard Addition to Wood Dale, known as the "Rossi" property.

3. After January 2, 1960 and from time to time until June 30, 1961, plaintiff and defendants Thomas E. Joyce and Leo Palewich, Jr. engaged in various negotiations with respect to the contract dated January 2, 1960.

4. In March 1961 L. J. Schaper, President of Year Investments, Inc., plaintiff, signed a deed as such President purporting to convey to World Wide Brokerage Corporation the Essig, Jarnebro and Rossi properties. L. J. Schaper left the deed in the office of defendant Thomas E. Joyce and did not see the deed again until after this action was commenced in December, 1961. At the time that Schaper left the deed in defendant Joyce's office, it had been signed by him, his signature had been attested by Elaine Swift, Secretary of Year Investments, Inc., containing the name of the purported grantor, and grantee, the purported consideration, and the properties to be conveyed. It did not have any date on it, it did not have on it the corporate seal of Year Investments, Inc. and the acknowledgment on the reverse side of the deed had not been filled out or signed by a notary public. At the time the deed was left by Schaper in the office of the defendant Joyce, Schaper did not intend it to be effective to convey any titles to World Wide Brokerage Corporation, as was known to defendant Joyce, individually and in his capacity of President of World Wide.

5. On April 5, 1961 Year Investments, Inc. conveyed title to the Essig properties to one Thomas E. Woelfle.

6. On June 14, 1961 defendant Joyce ordered from Corporation Supply Co., a corporate seal bearing the name "Year Investments, Inc". On the same date Corporation Supply Company made such a seal and defendant Joyce picked it up at the office of Corporation Supply Co.

7. On June 30, 1961 defendants Joyce, Palewich and Everlast entered into an agreement

with Year Investments, Inc. which was to settle all questions under the contract of January 2, 1960 or otherwise, and which as a part of said settlement confirmed title in Year Investments, Inc. to the Essig, Jarnebro and Rossi properties.

8. Subsequent to June 14, 1961, defendant Joyce or a person or persons acting under his direction, caused the July 19, 1961 deed to be dated July 19, 1961 and the bogus seal of Year Investments, Inc. purchased by defendant Joyce from Corporation Supply Company to be affixed to that deed and defendants Thomas E. Joyce and Leo Palewich, Jr. or one of them caused the acknowledment on the reverse side of said deed to be filled in and defendant Palewich, acting pursuant to the direction of defendant Joyce, executed the acknowledgment as Notary Public thereby falsely certifying that L. J. Schaper and Elaine Swift had appeared before him on July 19, 1961 and that they signed and delivered the July 19, 1961 deed as President and Secretary of Year Investments, Inc. and caused the corporate seal to be affixed thereto.

On July 24, 1961 defendants Thomas E. Joyce, Leo Palewich, Jr. and World Wide Brokerage Corporation, or one of them, caused the said deed to be recorded in the office of the Recorder of Deeds of DuPage County, Illinois.

9. On July 24, 1961 defendant Joyce applied to Chicago Title and Trust Company for a Title Guarantee Policy on the Essig property.

10. The acts recited in paragraphs 6 and 8 of these Findings were committed pursuant to a wilful, wanton and malicious conspiracy between defendants Thomas E. Joyce, Leo Palewich, Jr. and World Wide Brokerage Corporation to deprive plaintiff by fraud of the titles to the Essig, Jarnebro and Rossi properties, and were committed without any authority from or consent by Year Investments, Inc. The principal actor in this conspiracy to defraud plaintiff was defendant Joyce. Malice is the gist of the action against defendants Thomas E. Joyce, Leo Palewich, Jr. and World Wide Brokerage Corporation.

11. By reason of the acts recited in paragraphs 6 and 8 of these Findings, plaintiff

has been damaged and is entitled to recover from defendants Joyce, Palewich and World Wide, damages in the sum of $12,816.95, together with interest thereon in the sum of $1,011.31. Plaintiff is also entitled to recover from said defendants its reasonable attorneys fees in the sum of $2000.00 and its reasonable expenses in the sum of $1337.53.

12. Plaintiff has failed to prove any damages in connection with the Essig property or from the defendants Everlast Development Company, Frank A. Rossi or Marquette National Bank."

The questions presented to this court, are whether there is clear and convincing evidence in the record to support the findings of the trial court and whether the findings of the trial court show an assent of the minds of two or more parties to the prosecution of an unlawful enterprise.

It is well established that when the testimony before the court is contradictory, the court of review will not substitute its judgment as to the credibility of witnesses for that of the trial court which saw and heard them and will not disturb the findings of the trial court unless they are manifestly against the weight of the evidence. Wynekoop v. Wynekoop, 407 Ill. 219, 95 N. E. 2d 457; Mortell v. Beckman, 16 Ill. 2d 209, 157 N. E. 2d 63.

A review of this record clearly shows a sharp conflict in the evidence as to the signing, dating, sealing, acknowledging and delivery of the deed of July 19, 1961.

Thomas E. Joyce testified that he did not see the deed

dated July 19, 1961 in March of 1961. On July 19, 1961, in the presence of Schaper, President of plaintiff corporation, he completed the deed by inserting the date. He admits contacting Dwight and M. H. Jackson but denies asking them to make up a seal showing plaintiff's corporate name. He denies ever having such a seal in his possession. He denies impressing the seal on the deed dated July 19, 1961. He admits that Leo Palewich notarized the deed but claims that Schaper was present.

Anne Kolar and David Brenner testified that a seal bearing the name of plaintiff corporation was purchased in the name of Thomas Joyce and this is corroborated by Plaintiff's Exhibit No. 12.

Schaper testified that he has always kept the corporate seal in his possession. He took the deed of July 19, 1961 to Joyce's Office in March, 1961. The only signature on the deed was Elaine Swift. They were negotiating and he was going to convey properties listed in the first paragraph of the deed. The descriptions in the second paragraph were not in the deed. He signed the deed and left it with Mr. Joyce. He did not have the corporate seal with him the day he signed the deed. He did not impress the seal of the corporation on the deed.

Palewich testified that he notarized the deed when Schaper was present. He did not see Schaper put the seal on the deed. Further, the evidence shows the deed was recorded and did bear

the imprint of the corporate seal of plaintiff.

The facts surrounding the deed dated July 19, 1961, depended entirely upon which witness the court elected to believe. The findings of the trial court, as set out in its decree of January 28, 1963, are amply supported by the evidence and those findings meet the requirements of proof of conspiracy as decided in Tribune Company v. Thompson, supra,,

We cannot agree with the argument of the defendants that the decree fails to follow the findings of the trial court and, therefore, should be set aside. The decree of the trial court clearly and in detail sets forth the court's findings and the findings are consistent with the judgment that the defendants entered into a conspiracy to defraud the plaintiff. The memorandum of decision, dated November 9, 1962, entered in the record by the trial court, is not a detailed list of the specific findings of the court and is nothing more than notes of the general reasoning of the court in arriving at its decision. If the decision is correct on the record, this court cannot reverse the trial court because the trial court gave a wrong or insufficient reason. It is the decree and not the reason motivating the chancellor in entering the decree which is under review. Harrison v. Kamp, 395 Ill. 11, 69 N. E. 2d 261; Pelouze v. Slaughter, 241 Ill. 215, 89 N. E. 259. Since the decree is the subject of review and not the trial notes or

trial memorandum of the trial judge, the trial memorandum cannot take precedence over the formal findings of the trial court as set forth in the decree entered January 28, 1963.

The argument of the defendants that the trial court erroneously adopted the wrong measure of damages and that the damages, if any, should be limited to the amount which the plaintiff agreed to credit defendants, as provided by the contract, is not persuasive. Since the action here involved is in the nature of tort and not an action on the contract, the consideration given in the contract has no bearing upon the damages. The plaintiff is entitled to recover its actual damages as found by the trial court as a result of the conspiracy to defraud by these defendants. The question of damages, therefore, becomes a question of fact to be determined by the court.

The record discloses ample evidence from which the court could have properly determined the damages as set forth in the decree. On July 19, 1961, the Rossi property was subject to a contract of sale on which there was a balance due of $4,528.39. Since plaintiff was under obligation by virtue of said contract to convey the property to the contract purchasers upon the payment of the $4,528.39 and the contract purchasers were not in default, the value of the Rossi property to plaintiff was $4,528.39.

On the other hand, the contract of sale on the Jarnebro property was in default and the plaintiff was under no contractual obligation to convey the property upon the payment of the balance due under the contract of sale and, consequently, the value of this property to the plaintiff was not limited to the balance due under the contract.

The allowance of counsel fees and expenses under Section 41 of the Civil Practice Act, (Ill. Rev. Stats., 1961, Chap. 110, Sec. 41) is an attempt on the part of the legislature to penalize the litigant who pleads frivolous or false matters and thereby puts an undue burden upon his opponent to expend money for an attorney to disprove the allegations. Although the allowance of attorney fees under this section is discretionary, as was held in Ready v. Ready, 33 Ill. App. 2d 145, 178 N. E. 2d 650, the trial court can exercise that discretion only when the record discloses evidence of bad faith on the part of the pleader. This principle is clearly stated by the First District Appellate Court in Adams v. Silfen, 342 Ill. App. 415, 96 N. E. 2d 628, when at page 630 of 96 N. E. 2d it stated:

> "The purpose of this, (Section 41) obviously, is that, where it appears to the judge who has heard the cause on its merits that allegations or denials in pleadings were made without reasonable cause and not in good faith, he may without delay act upon his findings; provided, however, that an opportunity to be heard be afforded the party sought to be charged.

> "Even though a disputed issue of fact raised by the pleadings is decided adversely to the contention of one of the parties, it does not necessarily follow that such contention was motivated by bad faith."

The Supreme Court in Shapiro v. Grosby, 25 Ill. 2d 245, 184 N. E. 2d 855, further limits this discretion by making it clear that Section 41 of the Civil Practice Act is not to be used to limit the defendant in the presentation of several defenses. On page 857 of 184 N. E. 2d, the court said:

> "Plaintiff argues that the apportionment was proper because much of defendant's evidence related to defenses ultimately found to be unnecessary. We cannot accept the argument. When the evidence was taken it could not be known what the court's decision would be in regard to the several defenses, and the fact that defendants relied upon more than one does not of itself justify the assessment of part of the costs against them."

Consequently, it becomes necessary for this court to review the record to determine if there is any evidence on which the trial court could properly find that certain allegations of the defendants were not only untrue but were asserted in bad faith. It is not sufficient that the trial court found the facts to be adverse to these defendants. The allegations not only must be found to be untrue but it must be found that they were asserted by the defendants when the defendants knew them to be untrue.

The salient facts in this voluminous record center around the deed of July 19, 1961. The complaint alleges that defendants, Joyce, World Wide and Palewich purchased a bogus seal and dated, sealed, acknowledged and recorded the deed in conspiracy to defraud the plaintiff. These defendants deny that they purchased the bogus seal or that they placed the imprint of said seal on the deed. They admit dating, acknowledging and recording the deed but assert that Schaper, President of plaintiff corporation, was present and authorized the action. The deed itself shows that it was dated on July 19, 1961, acknowledged on July 19, 1961, recorded on July 24, 1961, and bore the imprint of the corporate seal. From this evidence, there could be no question of judgment or of inference to be drawn, based upon these facts. It is not a matter where the defendants could honestly believe that they did or did not do a certain act. If defendants performed the functions alleged in the complaint, their denials had to be with the knowledge that said denials were untrue.

The trial court found that the denials were in fact untrue. The record discloses sufficient evidence from which it could also find that said denials were, as a matter of fact, made in bad faith.

The record in this case discloses a series of rather loose and unusual methods of dealing in the transfer of real

estate between the parties and a sharp conflict on the evidence pertaining to the July 19, 1961, deed. The trial court, as the trier of facts, was called upon to judge the credibility of the witnesses and the inferences to be drawn from the conflicting evidence presented. Since the trial court had the opportunity of viewing the witnesses and determining the facts from the conflicting evidence, this court will not now substitute its judgment for the judgment of the trial court in its findings.

JUDGMENT AFFIRMED.

CROW, P. J. and SPIVEY, J. Concur.

(32825—9-66) 14

STATE OF ILLINOIS

APPELLATE COURT

44 I.A.2-373

AT AN APPELLATE COURT, for the ~~Fourth~~ THIRD Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE WILLIAM M. CARROLL, Presiding Judge

HONORABLE C. ROSS REYNOLDS, Judge

HONORABLE BURTON A. ROETH, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 19th day of DECEMBER A. D. 1963, there was filed in the office of the said Clerk of said Court an opinion of said Court, in words and figures following:

FILED
DEC 19 1963
Robert L. Conn, Clerk
APPELLATE COURT 3rd DIST.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

General No. 10451.

Agenda No. 3.

Baughman Manufacturing Co., Inc.,
Plaintiff-Appellee,
vs.
Clarence A. Hein, d/b/a Hein Equipment Co., and Hein Equipment Co.,
Defendants-Appellants.

Appeal from the Circuit Court of Jersey County.

REYNOLDS, J.

This case presents a single question, namely, whether service of process of summons out of the Circuit Court of Jersey County, Illinois, made by the sheriff's office in Milwaukee, Wisconsin, is sufficient to give the said Circuit Court jurisdiction over the defendant Hein for a judgment in personam. The method of service is not in dispute. Defendant filed his special appearance and motion to quash the service of summons. This was overruled by the court and a judgment in personam was entered in favor of the plaintiff and against the defendant. Defendant appeals.

The sole question presented here is whether the trial court had such jurisdiction as to make its judgment a judgment in personam against the defendant.

Section 16 of the Practice Act provides for personal service outside the State in the following language:

> "(1) Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of summons within this State; otherwise it shall have the force and effect of service by publication."

Since the defendant is not a citizen or resident of this State, the service in this cause must rest upon the theory that the defendant has submitted to the jurisdiction of the courts of this State. Section 17 of the Practice Act provides that:

> "17. Act submitting to jurisdiction - Process. (1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the

acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this State;"

The evidence in this case consists of the testimony of one, James A. Cadle, Jr., Assistant General Manager of the plaintiff. He testified the defendant was a distributor of the plaintiff for the State of Wisconsin; that in the years 1959 and 1960 defendant purchased from the plaintiff certain items of equipment and parts which were sold and delivered to the plaintiff, except when directed to be delivered at other places; that the plaintiff and defendant in 1958 had entered into a distributor's agreement and that the defendant owed the plaintiff the sum of $9,080.57.

There was no other testimony and the distributor's agreement was not offered in evidence.

In this case, the evidence shows that the defendant maintained

no office in Illinois, and transacted no business for the plaintiff or himself in Illinois; defendant was a distributor for the plaintiff, but such distribution of the plaintiff's products by the defendant was in the State of Wisconsin and there is no evidence that any distribution was done in Illinois, either by the defendant or by agent.

The decision of the Supreme Court in the case of Grobark v. Addo Machine Co., Inc., 16 Ill. 2d 426, is decisive of the facts in this case. In that case, Addo Machine Company, Inc. was the manufacturer of adding machines in the State of New York. Plaintiff was one of its distributors in the State of Illinois. Plaintiff purchased machines from Addo Machine Co., Inc. at a stated discount from list price for resale by plaintiff. Addo Machine Co., Inc. maintained no office in Illinois, employed no officers, agents or employees within Illinois, and shipped its products from New York to points throughout the United States. The relationship between it and the plaintiff was that of seller and purchaser. The court in that case held there were no minimum contacts with the State of Illinois, and that it did not submit to the jurisdiction

of the Illinois courts. On the basis of the testimony in this case, there is no showing of minimum contact by the defendant Hein, and he, therefore, did not submit to the jurisdiction of the Illinois courts. The fact that a distributor agreement was signed in Illinois is not enough. There must be some business transacted in Illinois. This was not shown.

For the reasons stated the judgment will be reversed.

Reversed.

CARROLL, P.J. and ROETH, J., concur.

No. 11768 Publish Abstract Only Agenda 2

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT., SECOND DIVISION

OCTOBER TERM, A. D. 1963

44 I.A.2 373

ELMER HOPKINS, Plaintiff-Appellee, vs. KRAFT FOODS COMPANY, a Foreign Corporation, doing business in Illinois, Defendant-Appellant.	Appeal from the Circuit Court, Stark County.

WRIGHT -- J.

This is an action by the plaintiff, Elmer Hopkins, to recover damages for personal injuries received by him in November, 1952, resulting from an attack by a bull owned and bailed for hire by the defendant, Kraft Foods Co., to the plaintiff. The case was tried before a jury in the Circuit Court of Stark County and a verdict was returned in favor of the plaintiff in the sum of $7,000.00. Judgment was entered on the verdict, from which judgment this appeal is taken.

The plaintiff in 1952 lived on a grain and dairy farm

near Bradford, Illinois. He was married and had two sons, ages fourteen and eleven. It had been his practice to acquire by bailment for hire a bull to service his cows from the defendant, a milk processing concern, where he sold his milk. For this service it was customary to pay $1.00 per cow serviced and to provide feed and care for the bull. When a bull was needed, the plaintiff would contact Milo Eldon Shaw, an employee and field man for the defendant, who was also overseer of the bulls owned by the defendant. In November of 1952, the plaintiff informed Shaw that he wanted a bull and that he wanted a "good, safe bull." A few days later a bull was delivered by a trucker employed by the defendant to plaintiff's farm. The plaintiff was not at home when the bull was delivered. The trucker placed the bull in the barn of the defendant and Shaw arrived sometime thereafter and talked with the plaintiff concerning the bull.

The testimony of plaintiff and Shaw is conflicting and contradictory concerning their respective conversations about the bull and the execution of Defendant's Exhibit No. 1.

The leasing agreement identified as Defendant's Exhibit No. 1 provided that the plaintiff leased a registered bull No. 110 from the defendant for a period of six months and further provided that the plaintiff agreed to the following:

"To indemnify Kraft and hold it

harmless from any and all loss, cost, damage or liability of any nature arising directly or indirectly from acts of said bull while it is in my custody pursuant to this loan agreement.

I further understand and agree that Kraft in loaning this bull to me does not in any way warrant its fertility or that it is free from dangerous tendencies."

The plaintiff denies that he signed Defendant's Exhibit No. 1, whereas Shaw states the plaintiff did so execute this instrument. Concerning the bull, plaintiff testified that Shaw told him "it was the safest one Kraft had, that not to worry about him, that he was just riled up from hauling him down, not to worry about him." According to the plaintiff, he informed Shaw that he wanted a safe and gentle bull because of his young sons working in the barn and the fields where the bull would be present.

Mr. Shaw testified that he knew that the bull was cross and so informed the plaintiff; and further testified that he informed the plaintiff that he had a bull but he could not let the plaintiff have it because he had been on the cocky side. Shaw further testified he talked to the plaintiff the day after the bull was delivered and inquired about his behavior and the plaintiff told him that there was nothing wrong with the bull, and further testified that he informed the plaintiff that if he was not satisfied with the bull or

its behavior to notify him and he would remove it immediately.

There is also a direct conflict in the evidence as to the date of the delivery of this particular bull. The accident occurred on November 30, 1952. According to the testimony of the defendant, the bull was delivered on November 10, 1952, and according to the testimony of the plaintiff the bull was delivered about a week prior to November 30, 1952. In any event, the plaintiff was injured on November 30, 1952, by being charged, butted, gored and horned by the bull.

It is the theory of the defendant that the plaintiff "Assumed all risk" while in custody of the bull and cannot look to the defendant for damages for the injuries complained of and further that defendant was released from any and all liability in this cause by the leasing agreement identified as Defendant's Exhibit No. 1. The defendant further contends that the plaintiff was guilty of contributory negligence as a matter of law and that the verdict of the jury was manifestly against the weight of the evidence and was excessive.

The defendant pleaded the leasing agreement as an affirmative defense and the plaintiff filed an unverified reply denying the execution of the leasing agreement. It is contended by the defendant that under Section 35 (2), Chap. 110, Ill. Rev. Stats., that the failure to verify the reply constituted a judicial admission that plaintiff did sign Defendant's Exhibit

No. 1. The statute, supra., relied upon by plaintiff on this question provides: "The allegation of the execution or assignment of any written instrument is admitted unless denied in a pleading verified by oath, except in cases in which verification is excused by the court."

In Lippincott v. Board of Education, 342 Ill. App. 642; 97 N. E. 2d 566, the same issue of whether on post-trial motion or on appeal, the party urging an admission for failure to deny under oath a writing which had been denied as being executed, came before the court. The Appellate Court in that case held that since counsel for both sides and the trial court had seen fit to allow the matter to be at issue without verification, "the court in effect properly excused the filing of a verified denial of the execution of the alleged contract." At no time during the trial did the defendant object to the testimony of the plaintiff that he did not sign or execute Defendant's Exhibit No. 1. In view of this fact, the defendant is estopped to claim the presumption that the execution of the leasing agreement is deemed to be admitted.

Even if it were assumed that the execution of the leasing agreement be deemed to be admitted because of the filing of the unverified reply, it would only dispense with proof of the execution of the instrument and its validity may still be questioned. Buttles v. Adkins, 318 Ill. App. 24. Taking the

evidence in the light most favorable to the plaintiff and with all reasonable inferences therefrom, there is ample evidence that defendant's agent, Shaw, made false statements to the plaintiff concerning the dangerous propensities of the bull in order to induce him to sign the leasing agreement. Whether or not the plaintiff executed the leasing agreement and whether defendant's agent made false representations concerning the bull to induce the execution of the agreement were all issues of fact properly presented for determination by the jury.

We cannot say as a matter of law that the plaintiff assumed all risk incidental to the custody of the bull. In applying the doctrine of assumption of risk, an appreciation of the danger is the factor that establishes responsibility, not mere knowledge of the defect or condition by which the danger is created, and this is a question for the jury. Fox v. Beall, 314 Ill. App. 144, 41 N. E. 2d 126. The jury could have well found that Shaw, as agent for the defendant, did assure the plaintiff that "the bull was gentle, and he was the safest bull the defendant had, and not to worry about him." No where in the evidence does it appear that the plaintiff ever knew of the bull's true, mean and vicious propensity until he was attacked. Even if assumption of risk were involved herein, it would not be required of the plaintiff in his complaint to

allege freedom from assumption of risk. Assumption of risk is an affirmative defense and if involved the duty to allege it would be upon the defendant.

The record, in our opinion, contains sufficient evidence to establish a reasonable basis from which the jury could conclude that defendant was guilty of the negligence charged, and in that state of the record we would not be justified in substituting our conclusions for those of the jury.

There is more than ample evidence that the defendant and its agent, Shaw, knew or should have known of the mean characteristics of the bull. Charles J. Stiers testified that he had this particular bull just before the plaintiff received it. He stated that the bull could not be handled except with dogs and that the bull lost his chain and jumped a fence and went to the neighbors and his son then called the defendant to remove the bull. This witness informed the trucker who removed the bull that it was mean and he wondered what the defendant would do with it. Kenneth Charles Stiers reiterated the facts recited by his father and further stated that he had a chain three feet long on the bull and a ring in his nose and that the night before the defendant hauled him away the chain was gone. He attempted to retrieve the bull from his neighbors but couldn't handle him so he and his hired man took two tractors to corral the bull and it charged them on

the tractors. He then stated that he called Kraft and told them: "He had gotten out of hand and we didn't want him anymore." Cecil A. Kraeger, a trucker employed by the defendant to remove the bull from the Stiers' farm, testified, "the bull was cross, the nature of him." He testified the bull came at him at Stiers but that the dogs stopped him. Kraeger further testified that after delivering the bull to plaintiff's farm he went back to the Kraft Plant where he saw Shaw, the field man, and informed him that there was nobody home when he got to the Hopkins Farm, and that he put the bull in where the cows were kept and shut the doors and that the bull was cross and that Shaw had better tell the man this bull was in there before he went in to do his chores.

We have carefully reviewed the conflicting and contradictory testimony and we cannot say as a matter of law that the verdict is against the manifest weight of the evidence. We cannot say as a matter of law that the verdict was not properly supported by the evidence. Likewise, it is a question for the jury whether the plaintiff has proven himself free of contributory negligence and the defendant negligent. Contributory negligence becomes a question of law only in a case where the evidence is so clearly lacking in that regard that all reasonable minds would conclude that the plaintiff was guilty of contributory negligence. Packard v. Kennedy, 4 Ill. App.

2d 177, 124 N. E. 2d 55.

The defendant lastly urges that the verdict in the sum of $7,000.00 is excessive. This contention, under the evidence in this case, is untenable. The amount of damages is primarily a question of fact for the jury to determine. The court has no right to substitute its judgment for that of the jury. This court will not disturb the result unless it is clear that all reasonable men would agree that the amount is excessive. Hulke v. International Mfg. Co., 14 Ill. App. 2d 5, 142 N. E. 2d 717.

After a careful consideration of the evidence and the record in this case, we find no reversible error was committed and the judgment of the Circuit Court of Stark County is accordingly affirmed.

JUDGMENT AFFIRMED.

CROW, P. J. and SPIVEY, J. Concur.

(32825—9-66) 14

STATE OF ILLINOIS

APPELLATE COURT

44 I.A.2375

AT AN APPELLATE COURT, for the ~~Fourth~~ THIRD Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE WILLIAM M. CARROLL, Presiding Judge

HONORABLE C. ROSS REYNOLDS, Judge

HONORABLE BURTON A. ROETH, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 19th day of DECEMBER A. D. 1963, there was filed in the office of the said Clerk of said Court an opinion of said Court, in words and figures following:

10484

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

FILED
DEC 19 1963
Robert L. Conn, CLERK
APPELLATE COURT 3rd DIST.

General No. 10484

Agenda No. 4

The People of the State of Illinois Ex Rel. Community Unit School District No. 5, Macon County, Illinois,

Plaintiff-Appellant,

vs.

Decatur School District No. 61,

Defendant-Appellee

Appeal from the Circuit Court of Macon County

CARROLL PRESIDING JUSTICE

This is a proceeding in quo warranto challenging the right of the defendant, Decatur School District No. 61, to exercise jurisdiction over certain lands which prior to their annexation by defendant were a part of Community Unit School District No. 5, of Macon County. The latter is referred to in the proceedings as the Macon District.

The Decatur District was created by a special charter dated February 16, 1865 and since said date has operated under such charter. It is alleged in the complaint that certain territory described in detail, and which is the subject of controversy between the parties, is a part of the Macon District; and that defendant claims such territory is a part of the Decatur District and without authority of law exercises over it the powers and functions of a school district. In its answer, the defendant admits claiming the territory, alleging that it was annexed to the Decatur District on

June 29, 1959. Defendant further alleges therein that Paragraph 16 of its special charter provides as follows:

> "All of the territory which, at the time of the passage of this act, or at any time hereafter, may be embraced in the corporate limits of the city of Decatur, shall be included and constitute a part of the Decatur School District, and any tract or tracts of land adjoining said district may be annexed to it, on condition that three-fourths of the legal voters residing within the limits of such tract or tracts shall petition the board of education to be annexed to said district, and that their petition shall be granted by the unanimous vote of all the members of said board; whenever any territory shall be so annexed to and become a part of said district, all the provisions of this act shall be applicable to it in the same manner as they would have been if it had been embraced within the district at the time of the passage of this act."

and that said paragraph has never been amended or repealed. The answer then sets forth the annexation procedures followed by the Board of Education of defendant pursuant to said paragraph 16 of the Charter, including the filing of a petition, holding of a hearing, taking of testimony, the unanimous adoption of a resolution declaring the territory annexed, and the filing with the County Clerk of a copy of said resolution accompanied by a map showing the boundaries of the district including the territory annexed. The answer also alleged that the said annexation was declared valid by act of the General Assembly of the State of Illinois approved July 8, 1959. (Sec. 407.32 Illinois Revised Statutes 1959).

Plaintiff moved to strike the answer and for judgment, alleging in substance that the provisions of the Decatur District special charter with reference to changing boundaries are unconstitutional; that defendant did not comply with Article 4-B of

the School Code which controls changes of school district boundaries. Plaintiff's motion was denied and it thereupon filed a reply re-alleging the unconstitutionality of the annexation provisions of the special charter, and the failure of defendant to comply with the annexation procedures prescribed by Article 4-B of the School Code. It was stipulated by the parties that during the period from January 1, 1956 to June 13, 1961 there had been 23 annexations to defendant district by virtue of petitions of residents in the annexed territory and resolutions of the Board of Education declaring the areas annexed; that some of these annexations involved territory from the Macon district; and that following all such annexations with the exception of those involved therein and in a companion case the Decatur District Board of Education promptly assumed jurisdiction over the annexed territory.

Upon trial of the issues, the court denied plaintiff's prayer for a writ of quo warranto and entered judgment for defendant. Plaintiff appealed directly to the Supreme Court asserting as jurisdictional grounds that there are constitutional questions involved. The case is here by virtue of a transfer order in which the Supreme Court indicates the appeal was wrongfully taken to that court.

The defendant has filed a motion in this court to dismiss the appeal and such motion has been taken with the case. In substance, the grounds upon which the motion is based are that the annexation involved herein was made prior to July 8, 1959, the affective date of the validating act; that the applicability of

such act to the annexation in question has not been raised or argued in the briefs; that the Supreme Court by its transfer order has determined the validating act to be constitutional; and that as a result no question remains for decision by this court; and the case is now moot. The plaintiff has filed objections to the motion to dismiss, asserting that there are non-constitutional questions involved; that such questions are those set out in plaintiff's brief under Points and Authorities, with the exception of those challenging the constitutionality of paragraph 16 in the Decatur special charter, and of the validating act. Substantially these points are that annexation by the Decatur District is governed by requirements of the school code as set out in Article 4-B thereof; that the Decatur District has abandoned its charter in part by following Article 4-B in another annexation; that the area involved in the annexation contains "islands" which remain part of the Macon District, but are entirely separated therefrom in violation of the Illinois Constitution; that several of these tracts do not adjoin the Decatur District; and that a defendant in a quo warranto proceeding has the burden of proof.

In transferring the appeal to this court, the Supreme Court upheld the validity of paragraph 16 of the Decatur special charter, and thus disposed of plaintiff's contention that annexation by the Decatur District is governed by the School Code. The procedure followed by the Decatur District was that prescribed by paragraph 16 of its charter. Plaintiff does not contend otherwise. Subsequent to the annexation, the Legislature enacted a statute declaring the territory in question to have been validly annexed to the Decatur

District. This validating act is as follows:

> "In all cases where, prior to the effective date of this Act, territory has been annexed to a Special Charter School District . . . by unanimous vote of the Board of Education of such School District . . . and a map has been filed with the County Clerk . . . showing the boundaries of such territory and its annexation to said Special Charter School District, then in each such case such territory is declared validly annexed to said Special Charter School District". (Sec. 407.32 Chap. 122, Illinois Revised Statutes 1959).

Plaintiff has not contended that this validating act does not apply to the annexation involved in this proceeding. The Legislature is vested with authority to create school districts and to prescribe the procedure for altering the boundaries thereof. Here there was compliance with all conditions required by the special charter as prerequisite to a valid annexation. Therefore, the annexation attacked in this proceeding was made legal and valid by the act of the Legislature. People v Board of Education, 330 Ill. 522.

For the reasons indicated, we are of the opinion that this case is now moot, and accordingly, defendant's motion to dismiss the appeal is allowed.

APPEAL DISMISSED.

REYNOLDS and ROETH, JJ. concur.

CHICAGO BAR ASSOCIATION FEB 24 1964

ABST.

49077

IN THE MATTER OF THE ESTATE OF SUZANNE SHIREY MC CANDLESS and WILLIAM WINTON MC CANDLESS, Minors,

ALICE LANQUIST FORCH,

Petitioner-Appellant,

vs.

SUZANNE SHIREY MC CANDLESS and WILLIAM WINTON MC CANDLESS, Minors, by DR. WILLIAM J. W. MC CANDLESS, their Guardian,

Respondent-Appellees.

44. I.A. 2400

APPEAL FROM THE

PROBATE COURT OF

COOK COUNTY.

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This is an action filed by petitioner, Alice Lanquist Forch, a great aunt of two minor children, requesting the Probate Court of Cook County to appoint the First National Bank of Chicago, as guardian of the Estate of the minors in accordance with the Will of the great grandfather. The respondent, father of the minors, filed a motion to dismiss the petition which was granted and petitioner appeals from this order.

The Will of Andrew Lanquist was admitted to probate by the Probate Court of Cook County on July 24, 1931. Paragraph Twelve of the Will reads as follows:

> Twelfth: If any beneficiaries shall be minors at the time any property shall vest in them under the provisions of this Will, I hereby nominate and appoint the First Union Trust and Savings Bank as Testamentary Guardian of the estate of such minor or minors, and hereby authorize and empower the said Bank to file the necessary Petition in any Court having jurisdiction of the Probate of estates of minors for its appointment as such guardian.

The First Union Trust and Savings Bank was consolidated with the First National Bank of Chicago. Andrew Lanquist is the great grandfather of Suzanne Shirey Mc Candless who was born on April 18, 1945, and William Winton Mc Candless who was born on June 14, 1948. In paragraph "Sixth" of his Will, Andrew Lanquist created a trust and the two minors are entitled to income by reason of this trust through their mother, Elsie Shirey Mc Candless, who was Andrew Lanquist's granddaugher and who is now deceased.

It is the petitioner's contention that irrespective of the minors' natural guardian, the testator has the right, with respect to the disposition of his property to minors, under his Will, to designate a guardian of the estate consisting of property he chose to bestow upon the minors.

"The power to appoint a testamentary guardian does not exist at common law; the power is strictly statutory." 20 I.L.P. Guardian and Ward §4; The People v. Small, 237 Ill. 169.

Section 144 of the Probate Act (Ill. Rev. Stat. ch. 3 §144) dealing with the selection of testamentary guardians provides:

> A parent of a child likely to be born, or of any living child, being a minor and unmarried, may by will designate a guardian of the person and of the estate of such child to continue during his minority or for a less time. But if the suriving parent is a fit and competent person no such designation shall deprive him of the custody, nurture, tuition, and education of the child or the right to designate by his will the guardian of the person of the child.

There is a plausible ring to the argument that there is a difference between designating the guardian of the person of the minors and designating the guardian of the estate of the minors

particularly to that part of his property that the testator has chosen to give to the minor. That argument is advanced here, but in our opinion it is answered by the aforementioned statutory provisions. Although cases have been cited to us from other jurisdictions to support petitioner's view, we have not attempted to discuss those cases because the precise language of the Illinois Testamentary Guardian Statute was not present in those cases. Nor are there any Illinois cases advanced except the case of Holmes v. Field, 12 Ill 424. (1851) which involved the appointment of decedent's widow as guardian of their child under his Will. In Holmes the court pointed out that by the statute then in force the father was "authorized, by deed or will, to appoint a guardian to his children till they shall arrive of age or for any less term." In the instant case, it is not the parent who by his Will attempts to appoint a testamentary guardian, but the great grandparent of minors who were not then in being.

Under our statute it seems clear to us that no person other than a parent of a child born or likely to be born may by Will designate a guardian for the estate of the involved minors. In the absence of a statute in force at the time of the Probate of the Will, or at the time of the filing of the petition conferring such power, we are constrained to hold that the great grandparent had no right to appoint a testamentary guardian for the minor children.

ORDER AFFIRMED.

ENGLISH, P.J., and MURPHY, J., conur.

Abstract only.

ABST.

CHICAGO BAR ASSOCIATION FEB 24 1964

49018

NATHANIEL MILLER, OSSIE MILLER, JOYCE MILLER, NATHANIEL MILLER, JR., a minor, by his father and natural guardian, NATHANIEL MILLER, and RALPH MILLER, a minor by his father and natural guardian, NATHANIEL MILLER,

Appellees,

v.

ETHEL DOUGLAS, doing business as O. F. DOUGLAS FUNERAL HOME, et al.,

Defendants

On Appeal of ETHEL DOUGLAS, d/b/a O. F. DOUGLAS FUNERAL HOME,

Appellant.

44 I.A.2 429

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

Default judgments were entered against defendant Ethel Douglas, doing business as O. F. Douglas Funeral Home, in favor of Nathaniel Miller, Ossie Miller, Joyce Miller, Ralph Miller, and Nathaniel Miller, Jr. The said defendant appeals from an order entered on September 17, 1962 denying her motion to vacate the judgments and quash service of summons.

The cause of action arose as a result of an automobile accident which occurred September 13, 1961. Summons was allegedly served on January 24, 1962. A default order was entered on April 13, 1962, and judgments in favor of all the plaintiffs except Nathaniel Miller, Jr. were entered on May 9, 1962. Judgment for Nathaniel Miller, Jr. was entered on June 11, 1962.

On June 11, 1962 the defendant Douglas, through her attorney, filed a motion asking to have the judgments entered on May 9, 1962 set aside on the ground that the

automobile at the time of the accident was driven by one Pounds without her permission. That motion was continued to June 22nd. On September 12, 1962 the defendant Douglas, specially appearing through other attorneys, filed a motion to vacate the judgments and quash service of summons. The motion, which was supported by an affidavit, sets up that the substituted service as shown by the Sheriff's return was not in compliance with the statutory requirements. On September 17, 1962 the following order was entered in the Circuit Court:

> "This cause coming on to be heard on Defendant, Ethel Douglas's motion to vacate a judgment entered by default and to quash service of summons and the Court having heard arguments of Counsel
>
> "It is hereby ordered, adjudged and decreed that defendant's motion be denied for the reason that this defendant submitted to the jurisdiction of this Court by the filing of a previous motion and petition on June 11, 1962 to vacate the default judgments and the subsequent hearing on said motion on June 22, 1962.
>
> "It is further ordered that Plaintiff's attorney is hereby granted leave to file a copy of the Defendant's motion and petition which was presented on June 11, 1962 for the reason that said original notice and petition is missing from the Court file."

The order continuing the motion filed on June 11th was entered by the same judge who entered the order of September 17, 1962. It is apparent from the order entered on September 17th that the court had considered the substance of the motion of June 11th. The motion to vacate the judgment filed on June 11th does not appear in the record. Nor is there any order of record disposing of that motion. During oral argument in this court it was admitted by counsel that the

attorney who presented the motion of June 11th represented the defendant Douglas and that the motion was presented as herein stated. Consequently the only question before this court is whether by filing that motion the defendant Douglas had submitted herself to the jurisdiction of the court.

Any action takenby the defendant, except to object to the jurisdiction of the court, is a general appearance. In Lord v. Hubert, 12 Ill.2d 83, 87, 145 N.E.2d 77, 80, the court said:

> "As is said in Supreme Hive Ladies of the Maccabees v. Harrington, 227 Ill. 511, a person cannot, by his voluntary action, invite the court to exercise its jurisdiction and at the same time deny that jurisdiction exists. The sole object of process is to notify the defendant of pending litigation so as to secure his appearance, and though not named as a party in the original action, a person may subsequently appear even after judgment and become bound by the foregoing proceedings as if initially served. (People v. Estep, 6 Ill.2d 127; Marsh v. Green, 79 Ill. 385; 3 Am. Jur., Appearances, sec. 37.) Although the court participation may come in many forms, suffice to say that any action taken by the litigant which recognizes the case as in court will amount to a general appearance unless such action was for the sole purpose of objecting to the jurisdiction. (People v. Estep, 6 Ill.2d 127; Supreme Hive Ladies of the Maccabees v. Harrington, 227 Ill. 511.) In Miller v. Moseley, 311 Ill. 157, the court held that a defendant by filing her petition to set aside a partition sale submitted herself to the jurisdiction of the court and waived prior service of process; a similar result was had in Craven v. Craven, 407 Ill. 252, where defendants reinvested the court with jurisdiction by participating in further proceedings after the case had long since been dismissed; and in Nolan v. Barnes, 268 Ill. 515, it was decided that a prior decision was binding upon the parties who later introduced its record in evidence regardless of whether or not the initial court had jurisdiction to enter the order."

Also see Brown v. VanKeuren, 340 Ill. 118, 172 N.E. 1; Widicus v. Southwestern Elec. Cooperative, 26 Ill.App.2d 102, 167

N.E.2d 799; 3 I.L.P. Appearances, sec. 4.

The motion of the defendant Douglas to vacate the judgments on the ground that service was defective came too late. The trial court did not err in holding that the prior motion of June 11, 1962 made by the same defendant brought her within the jurisdiction of the court. The order of September 17, 1962 is affirmed.

Affirmed.

Schwartz, P.J., and Dempsey, J., concur.

ABST.

CHICAGO BAR ASSOCIATION FEB 24 1964

48983)
) Consolidated
49003)

44 I.A.2 430

ANNA LEE LIPSCOMB, Individually and as Administratrix of the Estate of JUDGE LIPSCOMB, Deceased,

Appellee and Cross-Appellant,

v.

ALBERT COPPAGE, et al.,

On Appeal of HARRY S. FELDMAN,

Appellant and Cross-Appellee.

APPEAL FROM SUPERIOR COURT COOK COUNTY

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

This appeal is taken by Harry S. Feldman, defendant, from two judgments entered after a trial before a jury in the Superior Court of Cook County.

Anna Lee Lipscomb, individually and as administratrix of the estate of Judge Lipscomb, deceased, sued the defendant for damages due to the wounding of Anna Lee Lipscomb and the death of Judge Lipscomb as a result of a shooting by one Albert Coppage, a part-time bartender employed by defendant Feldman. The trial court entered judgments in favor of the plaintiff individually and as administratrix on the verdicts of the jury. Each of the judgments was in the sum of $10,000. The jury also returned a verdict in favor of Harry S. Feldman and against Anna Lee Lipscomb, as administratrix and also individually, on count one of the complaint, which asserted claims under the Dram Shop Act. The court entered judgment in accordance with that verdict. The plaintiff, as administratrix and in her individual capacity, has taken a cross-appeal from that judgment of the court.

The plaintiff in her dual capacity also filed in the trial court a motion, supported by affidavit and suggestions, asking the court to fix and tax reasonable attorney's fees in favor of the plaintiff and against the defendant in accordance with section 41 of the Practice Act, on the ground that the defendant, without reasonable cause and not in good faith, made a denial of plaintiff's allegation that the death of Judge Lipscomb resulted from the alleged assault upon him by Coppage. The court denied this motion, and the plaintiff also appealed from this order in her cross-appeal.

We will first consider the cross-appeal of the plaintiff. That cross-appeal is based upon the judgment of the court on count one of the complaint filed against the defendant by the plaintiff both in her individual and representative capacities. The court entered judgment on May 10, 1962. The defendant on July 25, 1962 filed a notice of appeal from the judgments of the court on count three of the complaint. On August 15, 1962 the plaintiff filed her notice of appeal from the judgment on count one. While we have considerable doubt as to whether the cross-appeal filed by the plaintiff is in accordance with rule 35 of the Supreme Court, no motion was made to dismiss the cross-appeal and we will consider the appeal on its merits. (See Heine v. Degen, 362 Ill. 357, 199 N. E. 832; First-Trust Joint Stock Land Bank of Chicago v. Cutler, 286 Ill. App. 6; 2 N.E.2d 758.)

Count one of the complaint as amended was an action brought under the Dram Shop Act (Ill. Rev. Stat. chap. 43,

par. 135). The theory of the plaintiff in this court is that Albert Coppage was served liquor in the tavern of the defendant, which caused in whole or in part his intoxication, and while in that condition he shot Judge Lipscomb inflicting wounds from which he died, with resulting injury to the plaintiff's means of support. At the conclusion of the evidence two specific interrogatories were submitted to the jury by the court upon the motion of the defendant. Both of the interrogatories applied to count one of the complaint. The interrogatories and answers were as follows:

> Does the jury find from the evidence that at the time and place of the incident complained of Albert Coppage was intoxicated. Answer: No.
>
> Does the jury find from the evidence Harry S. Feldman or his agent sold or gave alcoholic liquor to Albert Coppage. Answer: No.

The jury returned a verdict on count one for the defendant and against the plaintiff. The court entered judgment on the verdict. The plaintiff filed a post-trial motion in which she set out, among other things, that the verdict was against the weight of the evidence and that the court erred in instructing the jury. In that motion she further stated that the court had erred in its rulings on evidence during the progress of the trial. In the motion none of the instructions objected to are set out in full. In neither the abstract filed by the defendant nor in the supplementary abstract filed by the plaintiff are all the instructions given abstracted, and the conference of the court on the instructions, if held, does not appear in the record. In the post-trial motion of the plaintiff the only reference to the

special interrogatories is that "the Court erred in submitting the Special Interrogatories to the jury on behalf of the defendant, Harry S. Feldman."

In order for the plaintiff to recover on count one of the complaint it was necessary for her to prove to the satisfaction of the jury that at the time her husband was shot Coppage was intoxicated and his intoxication resulted from liquor either sold or given to him by the defendant. The plaintiff in her post-trial motion alleges that the verdict is against the weight of the evidence, but nowhere in that motion does she state that the answers returned by the jury to the special interrogatories were against the weight of the evidence. It is elementary law that where a general verdict is returned and special interrogatories are answered, the answers to the special interrogatories control the general verdict. In Biggerstaff v. New York C. & St. L. R. Co., 13 Ill. App.2d 85; 141 N.E.2d 72, we said:

> "The plaintiff argues that the verdict was against the manifest weight of the evidence and that the answers to the special interrogatories were not responsive to the evidence. In his motion for new trial the plaintiff calls attention to the giving of the three interrogatories and only says that the court erred in submitting them to the jury. He made no motion to strike the answers to the interrogatories, nor did he allege that they were contrary to the manifest weight of the evidence, though in the motion he did urge that the verdict was contrary to the manifest weight of the evidence. In Forslund v. Chicago Transit Authority, 9 Ill.App.2d 290, we held that where a finding is substantially conclusive of the fact upon which the issue of liability depended and the defendant had failed to object to the answer to the interrogatory in the motion for new trial, the reviewing court must consider the special findings to have been fully sustained by the evidence and in support we cited Voight v. Anglo-American Provision Co., 202 Ill. 462;

> Weinrob v. Heintz, 346 Ill. App. 30; Brant v. Chicago & Alton R. Co., 294 Ill. 606; and Brimie v. Belden Mfg. Co., 287 Ill. 11. In Rubottom v. Crane Co., 302 Ill. App. 58, the court said: 'Under the authorities there are several ways by which a party may escape from being conclusively bound by the special finding of a jury: (1) by specific objection to the special finding on the motion for a new trial, or (2) by filing a specific motion to set aside the special finding when the motion for a new trial is made."

The answers to the interrogatories control the general verdict and negate the claim of the plaintiff for relief under the Dram Shop Act.

The plaintiff has in her post-trial motion objected to the submission of the interrogatories. In the record before us there is no showing that any objection was made at the time when the interrogatories were submitted. Without an objection appearing in the record we could under no circumstances consider the point urged by the plaintiff. Weinrob v. Heintz, supra; Worthen v. Thomson, 343 Ill. App. 62, 98 N.E.2d 142. Nor can we consider any objections purportedly made in the post-trial motion by the plaintiff with reference to instructions. Unless the objection to instructions is made at the conference on instructions any alleged error cannot be reviewed. Saunders v. Schultz, 20 Ill.2d 301, 170 N.E.2d 163; Seaquist v. Alexander, 34 Ill.App.2d 8, 180 N.E.2d 213.

The trial court committed no error in denying plaintiff's post-trial motion as to count one of the complaint as amended. The judgment of the Superior Court on count one of plaintiff's amended complaint in favor of the defendant

Harry S. Feldman and against Anna Lee Lipscomb is affirmed.

The second count was by the plaintiff individually and as administratrix against Albert Coppage for killing Judge Lipscomb and shooting Anna Lee Lipscomb. Albert Coppage was dismissed out of the case by the court on its own motion, and count two will not be considered here.

Count three of the complaint sets out an action by the plaintiff, individually, for personal injuries, as well as a wrongful death action for the death of Judge Lipscomb brought as administratrix of his estate. Among other things it alleges that the plaintiff and her husband were present in the tavern on April 30, 1955; that one Jessie Lester was in charge of the tavern on behalf of defendant Feldman; that the Lipscombs were in the exercise of due care and caution for their safety; that the duly authorized agent and servant of the defendant Feldman was then and there on duty or in charge of the tavern in Feldman's behalf and that defendant Feldman was "then and there under a duty to exercise due care and caution to see that persons in said tavern and dramshop conduct themselves properly with reference to the safety of others, that they did not become boisterous, quarrelsome and/or violent or likely to inflict injury on the patrons of the said tavern"; that defendant Feldman and Lester, in disregard of their duty, permitted Coppage to become "intoxicated, quarrelsome, violent and boisterous" and permitted him to be in and about the tavern displaying a loaded revolver and pointing or aiming the

pistol at the plaintiff's intestate and at the plaintiff; and that Feldman and Lester either knew or in the exercise of reasonable care should have known of the violent, quarrelsome and intemperate conduct of Coppage. The complaint then alleges the assault on the plaintiff and plaintiff's intestate. It further alleges that it was the duty of Feldman and Lester to have ejected Coppage and protected the plaintiff and plaintiff's intestate; and that they disregarded their duty and as a direct and proximate result thereof the plaintiff and her intestate were violently assaulted by Coppage.

The defendant filed an answer to all the counts in the complaint. In his answer to count three he admits the operation of the tavern, denies any duty owed by him, and in the alternative, that if he did owe any such duty he did not violate it. He denies that the plaintiff and plaintiff's intestate were exercising due care and caution for their own safety, and among other things denies that Coppage had a pistol on the premises which he was displaying to any person.

At the close of the trial the jury returned a verdict finding in favor of the plaintiff as administratrix of the estate of Judge Lipscomb, deceased, as to count three and against defendant Feldman, and assessing plaintiff's damages in the sum of $10,000. The jury also returned a verdict finding for the plaintiff, individually, as to count three and against the defendant Feldman, and assessing plaintiff's damages at $10,000. The court on the same day

entered an order dismissing Lester and Coppage as defendants. The court entered judgments on the verdicts.

Defendant Feldman filed a post-trial motion in which he asks that the court enter judgment notwithstanding the verdict as to count three, and in that motion he alleges that the plaintiff's evidence failed to show that the defendant owed any duty to the deceased or to the plaintiff, that he did not violate any duty, and that the plaintiff's evidence was not sufficient to carry the case to the jury. In the post-trial motion he also moved in the alternative for a new trial, basing his motion, among other things, on the ground that the verdict was contrary to the "manifest [sic] weight of the evidence." Certain other objections were made with reference to the introduction of evidence and to the giving and refusing of certain instructions. The court denied the post-trial motions and thereupon the defendant Feldman filed a notice of appeal.

In this court the defendant Feldman contends that he was not present nor was he responsible for any of the events which transpired on the day and place in question. It is his theory that the fatal shooting of Lipscomb took place outside the tavern some fifteen minutes or more after Coppage and Lipscomb had left the tavern, and that the wounding of plaintiff did take place in the tavern but was not foreseeable and the bartender, Lester, was in no position to have stopped the occurrence. The defendant asks this court either to enter a judgment notwithstanding the verdict or to reverse the judgment and remand the case for a new trial.

As we have pointed out in discussing the judgment which the court entered on count one of the complaint, no conference on instructions in the trial court appears in the record. Consequently we cannot under the authorities heretofore cited discuss any question concerning the giving or refusal to give instructions. Nor can we consider the alleged errors of the court in sustaining objections to evidence offered by the defendant or improperly admitting evidence against him. The post-trial motion does not follow the rule that the only objections which this court can consider on review are those which were specifically set out in the post-trial motion. A mere statement that the court improperly sustained objections or improperly admitted evidence is not sufficient. That practice was proper practice before the adoption of the Practice Act in 1933, as amended in 1955. These matters have been discussed in so many cases that it would seem that the eight-year period from the adoption of the amended Civil Practice Act in 1955 would be sufficient to permit even the most busy lawyer to acquaint himself with the statutory rules as interpreted by the courts of review. In Perez v. Baltimore and Ohio R. Co., 24 Ill.App.2d 204, 164 N.E.2d 209, we said:

> "In reference to his assertion that the trial court erred in admitting improper evidence, the plaintiff contends that paragraph 6 of his post-trial motion covers all errors of evidence raised on appeal. This paragraph is as follows: '6. The Court erred in admitting improper evidence offered by the defendant at the trial of said cause over the objection of the plaintiff.' The Civil Practice Act (68.1(2), ch. 110, Ill. Rev. Stat. 1959) states: 'The post-trial motion must contain the points relied upon, particularly specifying the grounds in support thereof . . .'

> Paragraph 6 of the motion is a 'point relied upon' but it satisfies only one requirement of the statute. The paragraph is general. It does not meet the further requirement of 'particularly specifying the grounds in support thereof.' The word 'particularly' is opposed to generality. The word 'specifying' means to define in detail. Either one of these words would suffice to show what is needed. The combination of both of them emphasizes the necessity of itemizing the grounds supporting the points advanced in a post-trial motion. A trial judge should have an opportunity to appraise the errors which are asserted to have taken place. It is unfair to charge him with errors in a reviewing court without having brought them to his attention so that a new trial could have been granted if he found it advisable. Illinois Cent. R. Co. v. Johnson, 191 Ill. 594; Pajak v. Mamsch, 338 Ill. App. 337."

Also see McCormack v. Haan, 23 Ill.App.2d 87, 161 N.E.2d 599. Consequently there are only two question before this court.

The first question is, Did the court err in denying judgment notwithstanding the verdict in favor of Feldman? That question can be disposed of very shortly. There was evidence in the record upon which a jury might properly infer that defendant Feldman was responsible for the occurrences in question.

The second question is, Was the judgment against the manifest weight of the evidence? As we have pointed out in Vasic v. Chicago Transit Authority, 33 Ill.App.2d 11, 180 N.E.2d 347, a reviewing court is not authorized to disturb the verdict unless the verdict and judgment are against the manifest weight of the evidence, citing and quoting from Read v. Cummings, 324 Ill. App. 607, 59 N.E.2d 325, where the court says that the reviewing court must take into consideration not only the verdict of the jury but the fact

that the trial judge saw and heard the witnesses in overruling the motion for a new trial and entering judgment. Also see Valant v. Metropolitan Life Ins. Co., 302 Ill. App. 196; 23 N.E.2d 922; Sears, Roebuck & Co. v. Mears Slayton Lumber Co., 226 Ill.App. 287; Mokrzycki v. Olson Rug Co., 28 Ill.App.2d 117, 170 N.E.2d 635. In the Vasic case we said: "In order for the court to determine that the verdict is against the manifest weight of the evidence an opposite conclusion must be clearly evident or the jury's verdict palpably erroneous and wholly unwarranted from the manifest weight of the evidence. Benkowsky v. Chicago Transit Authority, 28 Ill App2d 257, 171 NE2d 416. A verdict will not be set aside merely because the jury could have found differently or because judges feel that other conclusions would be more reasonable. Kahn v. James Burton Co., 5 Ill2d 614, 126 NE2d 836."

The evidence in this case was in sharp conflict. There is no question that at the time of the occurrence Feldman, the owner of the tavern, was not present. Three bartenders were supposed to work at the tavern that night, Lester, Coppage and Armsted. Lester at the time of the initial altercation between the Lipscombs and a third party was behind the bar in the tavern. Coppage himself testified that after he had told Lipscomb that he had to leave the tavern he, Coppage, went to the end of the bar, took his pistol from a "burglar alarm box" and put it in his pocket. He also testified that each day he brought the pistol to the tavern and at night he would take it home. Feldman

testified that Coppage was supposed to work as a bartender until two o'clock. Feldman further testified that he did not keep any guns in the tavern; that he did not know that Coppage had a gun there; that there was a rule that bartenders should not drink with customers or buyers; that he, Feldman, knew that Coppage owned a gun; and that he did not make any inquiry as to whether Coppage or any of the other bartenders had a gun on the premises.

The plaintiff, together with two other witnesses, testified that prior to the initial dispute and at the time when she and her husband entered the tavern, Coppage was behind the bar and he and another customer had a glass apiece and were drinking from a bottle of whiskey, and that Coppage had four or five drinks and later started to serve other people at the bar. James M. Lipscomb testified that Lester had served the liquor to Coppage. Robert Tapplar testified that Coppage after the shooting had a distinct odor of alcohol on his breath. Coppage denied that he had been drinking that evening. Lester also testified that he had not seen Coppage take any drinks.

While apparently the interrogatories submitted to the jury with reference to the sobriety of Coppage were directed to the first count, it would seem that they would also be controlling as to the third count of the complaint. However this court finds that it was proper for the jury to consider the conflicting evidence with reference to Coppage's drinking even though they found that he had not become intoxicated.

The evidence is also in sharp conflict as to what occurred at and immediately prior to the fatal shooting of Lipscomb. Coppage testified that he worked from six o'clock until closing time, that closing time was two o'clock, and sometimes on Wednesdays they closed at twelve and one o'clock. Some dispute apparently resulted because of the conduct of a third person in the tavern. The plaintiff said that the third person was the aggressor; Coppage says that the plaintiff had encouraged the third person to take liberties with her. In any case a quarrel resulted between Lipscomb and Coppage, and Coppage ordered Lipscomb to leave the tavern.

Coppage testified that at about one o'clock Lipscomb left the tavern and two or three minutes after that Coppage left; that Lipscomb got into a car and drove away; that the plaintiff was inside the tavern talking to Lester; that at the time he, Coppage, was wearing his white bartender's apron; that he went out of the tavern, went to a car in which his wife was sitting, and drove around the block; that he returned to the front of the tavern five minutes later; that Lipscomb in his car pulled up behind him; and that he (Lipscomb) had with him his son-in-law and brother.

The plaintiff on the other hand testified that she and her husband had started out the door when Lester called to her and she stopped to talk to him; that her husband walked outside and was standing outside; that Coppage walked out the door and came back in a car with his wife in about ten or fifteen minutes; that at the time when he got out of the car

he had a gun in his hand; that he walked inside the tavern, "two feet inside of the door"; that she turned around and Coppage called to her husband and profanely told him to come into the tavern and that if he did not come in he would so handle the plaintiff that Lipscomb would have wished that he had come in; that Coppage then drew his gun, fired three shots, and her husband fell, and that at the time her husband had no weapon in his hands or visible on his person. The testimony of James M. Lipscomb and Robert Tapplar is of the same tenor.

Lester testified that after the first quarrel with Lipscomb, Coppage was putting beer in the cooler and that he then told him (Lipscomb) that if he waited until he stocked up the beer "he would take care of him"; that after he had finished with the beer he went to the fire alarm box and reached down; and that he (Lester) could not see what Coppage got out of the box. Lipscomb had walked out of the tavern and it was ten or twenty minutes before Coppage walked out. Later he saw Coppage getting out of his car at the curb and during that period Lipscomb was on the outside some place and the plaintiff was inside talking to him. He testified that he saw Coppage pass by Lipscomb and come into the tavern and that he said to Lipscomb he was ready for him and that he saw guns in both Coppage's and Lipscomb's hands.

Anna Lipscomb testified that after her husband was shot Coppage left the tavern, went to where her husband was lying, pointed his gun at her son and told him not to move Lipscomb; that Coppage then returned to the tavern and

profanely said that he had got Lipscomb and that he was going to get her; that he walked over, whirled her around and shot once and missed her, and the second time shot her through the ear and down the neck and the bullet went in her shoulder; that Lester had said, when Coppage got back in the tavern, he was going to call the police. After she was shot Lester did call the police and the police got there in about five minutes.

Coppage testified that he saw the plaintiff take a gun from her hand bag and give it to her husband while he was in the tavern. The jury were entitled to consider this testimony along with the testimony of the police officer. The plaintiff denied giving any gun to her husband, and said that at the time she had neither a gun nor a hand bag.

Lester testified that after the shooting he took the gun from Coppage and that Coppage went out and came back with a gun in his hand and said, "This is my evidence," and he took a piece of newspaper off the bar and wrapped the gun in it. He also testified that after the police were called they arrived in about five minutes.

Coppage testified that after he got out of his car Lipscomb got out of his car and said to him that he, Lipscomb, was going to kill him; that he (Lipscomb) snapped his pistol in his (Coppage's) face twice and that he, Coppage, then shot him; that he then came back in the tavern. Coppage also testified that after he left his car and before the shooting he had re-entered the tavern and that he pointed his pistol

at the plaintiff's son; that she then started the tussle with him and the pistol went off and shot her. He also testified that he had been standing in the tavern at the time he shot Lipscomb and that he immediately went out and got Lipscomb's pistol, brought it into the tavern, wrapped it in a piece of paper and handed the gun to Lester. Lipscomb was taken to the hospital and the police took Coppage into custody. All witnesses agree that, at the time the shots were fired which killed Lipscomb, Coppage was inside the door of the tavern.

Several police officers testified. One of them, Officer Goebel, testified that he had talked to Coppage at the tavern and that in his opinion Coppage was sober; that he looked at the guns, one had been recently fired and the other one had two shells which were dented but had not exploded. The next morning with another officer he talked to Lipscomb in the hospital and asked him if he had a gun. Lipscomb first said he had not, and then he said he did. On cross-examination the officer testified that at the coroner's inquest he had said that Lipscomb had told him that he owned a gun and had it with him that night but that he did not take it out of his pocket. The officer on cross-examination testified that there was no notation in the report with reference to the sobriety of Coppage, nor was there anything in the report with reference to the dented shells in the other gun; and that he did not get a complete statement at the time from Coppage, nor did he ever subsequently attempt to get a statement.

Officer Hill testified that at the time Coppage was sober. His testimony with reference to Lipscomb's statement

is the same as that of Goebel's. He also testified that when he came to the tavern two guns were given to him. The testimony of Officer Smith was generally to the same effect, and he said that in his opinion Coppage was in a condition to give a statement.

Officer Joachim testified that he entered the tavern with OfficerManzella; that the man behind the bar turned two guns over to Manzella; that the man who gave Manzella the guns was Coppage; and that Coppage at the time was in his opinion normal and not under the influence of liquor. On cross-examination David Alswang, the attorney for the plaintiff, asked Joachim if he had not told him sometime previously that he (Joachim) wanted to see all the records and that he would testify that in his opinion Coppage was drunk. Joachim denied that he made any such statement. David Alswang then took the stand and testified that Officer Joachim had told him in their prior conversation that Coppage was drunk, and that on the day of the trial Joachim had told him that Coppage showed signs of having been drinking but that he would not testify he was drunk because that was a question only a medical man could answer.

There is a duty resting upon a proprietor of a tavern to see that his guests are free from annoyance or injury. It is similar and falls within the same category as the duty resting upon innkeepers at common law. Ordinarily the courts have held that reasonable care should be exercised to insure their safety. In one case in Illinois it has been held that an innkeeper is responsible for a "high degree of care" to prevent injury to his guest. Fortney v. Hotel Rancroft, Inc.,

5 Ill.App.2d 327, 125 N.E.2d 544. See also 21 I.L.P. Innkeepers, sec. 6.

When a person employs an agent to transact business for him he is responsible for any act of the agent performed in the course of his duty. "The maxim of respondeat superior is founded on the principle that he who expects to derive advantage from an act which is done by another for him must answer for any injury which another may sustain from it." Barker v. C., P. & St. L. Ry. Co., 243 Ill. 482, 488, 90 N. E. 1057, 1059. Under that doctrine the master is responsible for negligent acts of his servant or agent while acting within the scope of his employment. Laver v. Kingston, 11 Ill.App.2d 323, 137 N.E.2d 113.

The case before us is not well pleaded. However in count three of the complaint there is sufficient alleged to bring it within the above stated principles. The doctrine of respondeat superior is invoked only as to the conduct of Lester. Defendant Feldman testified that he employed three bartenders, that there was nobody actually in charge when he was not there but that each man had his duty and his own work but that Lester closed the tavern and carried the keys. This testimony would be sufficient for the jury to infer that Lester, if he was not actually the manager, at least occupied a position somewhat akin to it in the absence of Feldman. There is testimony in the record that Lester had served Coppage intoxicating liquor in violation of the rule of the tavern, that he knew of the quarrel between Coppage and the deceased Lipscomb, that he saw Coppage go to the fire alarm box and go out of the tavern wearing his white apron before he was off duty, and that he delayed the departure of Lipscomb and his wife by engaging her in

conversation. Lester at the trial testified that he did not know what, if anything, Coppage had taken from the fire alarm box. At the inquest he testified that he knew it was a gun which Coppage had put in his pocket. Whether we could consider this statement of Lester as something in the nature of an admission is not too material. The statement is sufficient to permit the jury to disregard Lester's testimony that he did not know that Coppage had a gun upon his person at the time he left the tavern. No explanation is given for Coppage's starting out in his car and returning to the tavern. The jury are of course the judges of the credibility of the witnesses. From the record before us some of the testimony of the police officers is of a character which might raise grave doubts as to credibility in the minds of the jurors. The circumstances brought out in the evidence would indicate a potentiality of violence which should have been apparent to Lester. Under those circumstances a duty would then devolve upon Lester to call the police, and a violation of that duty under the doctrine of respondeat superior could be laid upon the defendant Feldman. The testimony shows that after the police were called they got to the tavern in five minutes. If they had been called by Lester at the time when Coppage left the tavern this case would not be before us. The jury could have properly inferred from the evidence that Lester violated the duty which he owed to plaintiff and her husband on behalf of the defendant Feldman. If that duty was violated, then Feldman could properly be found guilty. The verdict of the jury is not against the manifest weight of the evidence. The trial court properly overruled the alternative motion of the defendant for a new trial as well as his motion for judgment notwithstanding the

verdict.

The plaintiff made a motion in the trial court, supported by an affidavit of plaintiff's attorney, asking the court in accordance with section 41 of the Civil Practice Act (Ill. Rev. Stat. chap. 110, par. 41) to allow expenses and attorney's fees to the plaintiff because the defendant in his answer to count one of the complaint, while admitting the death of Lipscomb, denied that he died as a result of such assault. This motion the court denied. Section 41 of the Practice Act provides: "Allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court at the trial."

The case of McGourty v. Chiapetti, 38 Ill.App.2d 165, 186 N.E.2d 102, was cited by the plaintiff in support of her contention that the trial court improperly refused to entertain her motion for costs and attorney's fees. In that case the court discusses a statement of the attorney made in the trial of the case with reference to the pleadings. It is true that the case is not in sharp application to the case before us. To excuse his pleading in the instant case, defendant in his brief says that, while the court was correct in what it said in the McGourty case, it should "not be forgotten that the pressure of the tremendous pile-up of litigation adversely affects the busy lawyers, perhaps even more than anyone else. Lawyers constantly on trial just cannot devote the time which should be spent on pleadings and are driven into a habit of short denials, which tends to be overworked." The answer to that argument is that when an attorney becomes so busy that he

cannot properly plead and try his cases he should seek assistance. In the McGourty case we also said: "There is no longer any place for the general issue lawyer who denies everything so as to put his opponent to proof on every issue. The Civil Practice Act and the amendments thereto have been designed to avoid this." In Ready v. Ready, 33 Ill.App.2d 145, 178 N.E.2d 650, we affirmed the action of the trial court in allowing costs and attorney's fees and said: "Section 41 is an attempt of the legislature to penalize the litigant who pleads frivolous or false matters or brings a suit without any basis in law and thereby puts the burden upon his opponent to expend money for an attorney to make a defense against an untenable suit. The failure of the courts to apply the sanction provided in this section of the Practice Act has been frequently criticized by writers in the various law reviews."

The defendant also argues that it is impossible to tell whether the death of Lipscomb resulted from the shooting. Such an argument is in our opinion frivolous. The trial court should have held a hearing, allowed the motion of the plaintiff, and entered an order imposing upon the defendant reasonable costs and attorney's fees under section 41.

The judgment of the Superior Court of Cook County on count one of the complaint in favor of defendant Harry S. Feldman is affirmed. The judgments of the trial court on count three of the complaint in favor of Anna Lee Lipscomb, individually and as administratrix of the estate of Judge Lipscomb, deceased, against Harry S. Feldman are affirmed. Insofar as the order of the trial court denied plaintiff's motion under section 41 for costs and attorney's fees it is reversed, and the cause is remanded to the

trial court with directions to hold a hearing on said motion and enter an order allowing costs and attorney's fees as provided in section 41 of the Practice Act.

Affirmed in Part; Reversed in Part
and Cause Remanded with Directions

Schwartz, P.J., and Dempsey, J., concur.

ABST.

CHICAGO BAR ASSOCIATION

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CITY OF CHICAGO, a municipal corporation, Plaintiff-Appellee, v. ARAM A. HARTUNIAN, Defendant-Appellant.	)	44 I.A.2 467 APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the trial court denying defendant's motion to vacate judgment, set aside the finding of the court, and discharge the defendant, or in the alternative, for a new trial.

Defendant was found guilty in the Municipal Court of Chicago of twenty-three separate traffic violations. He made a motion to consolidate in the trial court, which was denied. He renewed the motion on appeal. The trial court refused to grant the consolidation, and since separate appeals were not taken, the cases cannot be consolidated here. Hence the only case before this court is No. D5549915, in which the defendant is charged with parking in an alley, in violation of the Municipal Code of Chicago, Ch. 27, § 312. An examination of the record indicates that this was one of five violations on which defendant received an actual summons. Defendant did not learn of the other eighteen violations until he appeared before the trial judge to make a defense with respect to the five cases hereinbefore mentioned.

Defendant's defense is that friends were driving

his car at the time of the violations, and although he could give a list of those friends, he could not tell specifically which one was driving the car at the time of the specific violation. The presumption of law is that the person in whose name the vehicle is registered is prima facie responsible for the violation and subject to the penalty.

In his motion to vacate, or in the alternative for a new trial, defendant states a number of defenses, among them the charge that the finding was not supported by any evidence, since the court did not require the City to first submit its evidence against the defendant.

An examination of the report of proceedings substantiates defendant's claim. Actions for violation of municipal ordinances are subject to the rules of civil procedure. City of Chicago v. Williams, 254 Ill. 360, 98 N.E. 666; City of Chicago v. Campbell, 27 Ill. App. 2d 456, 170 N.E.2d 19; City of Chicago v. Lewis, 28 Ill. App. 2d 189, 171 N.E.2d 70. The City was required to make its case before the burden of going forward would shift to the defendant. There is no evidence that an actual violation of the ordinance occurred. All that was before the trial court was defendant's admission that the car was his and that the complaint charged violation of Ch. 27, § 312, of the Municipal Code of Chicago.

In view of our decision, it is unnecessary to consider defendant's other contentions. There being no evidence to support the finding of the court, the

judgment must be reversed.

Judgment reversed.

McCormick and Dempsey, JJ., concur.

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